NO. 22205

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BATRIS W. PEROVICH, dba
B. W. PEROVICH CONSTRUCTION
COMPANY,

Appellant,

vs.

PIPE LININGS, INC.,

Appellee

FEB 2 1969

APPELLEE'S BRIEF

FILED

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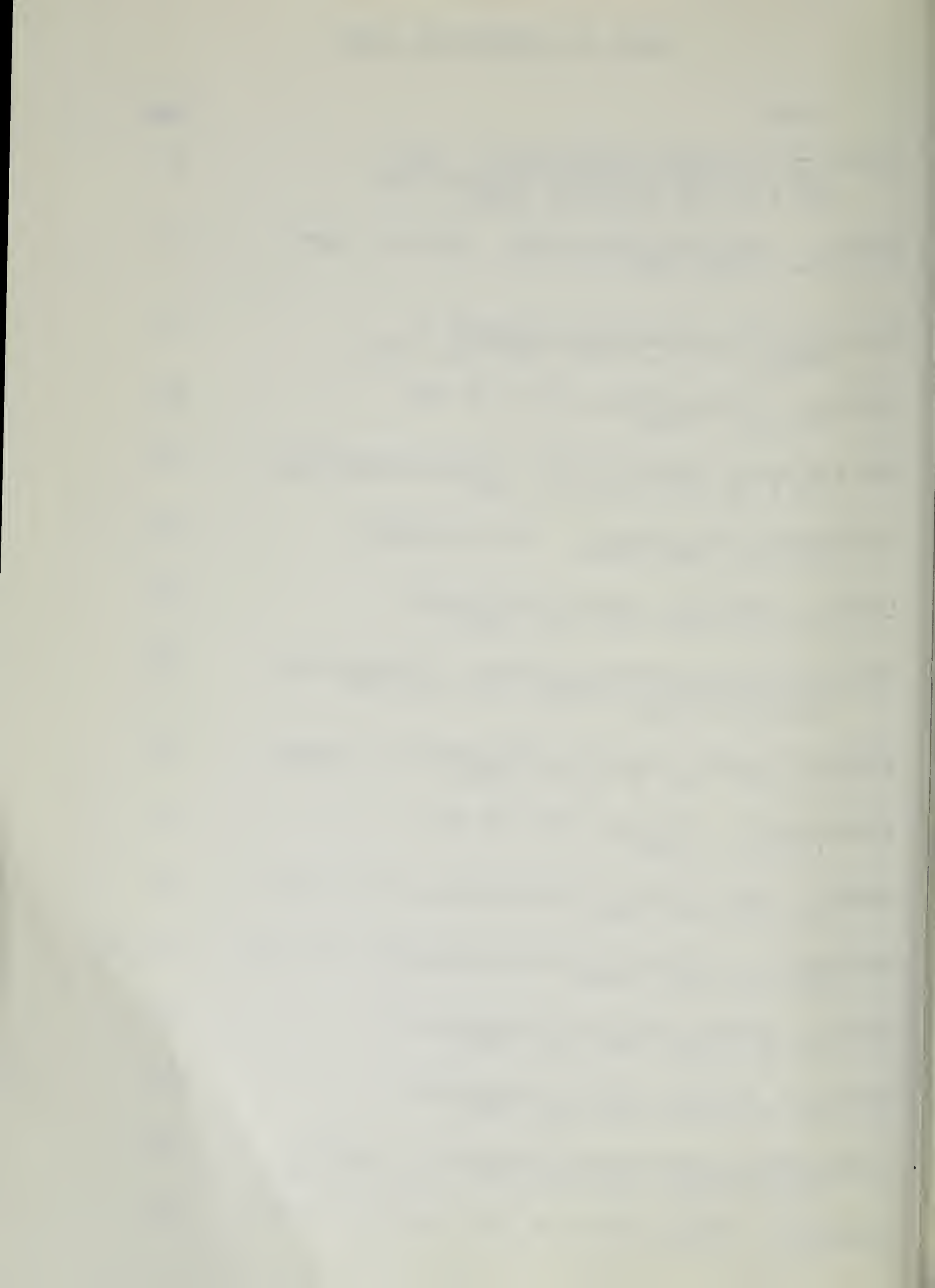

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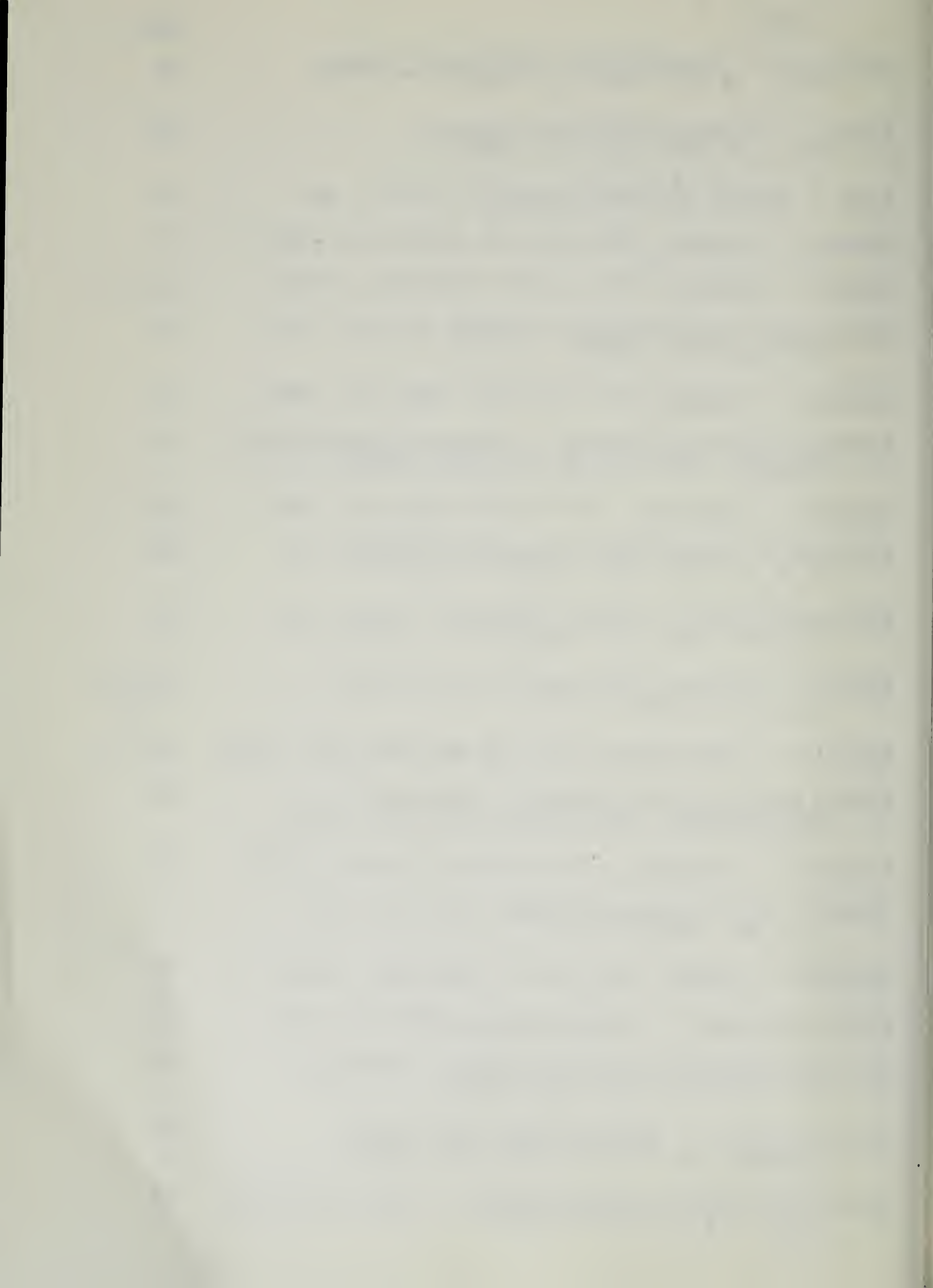

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Appellees.

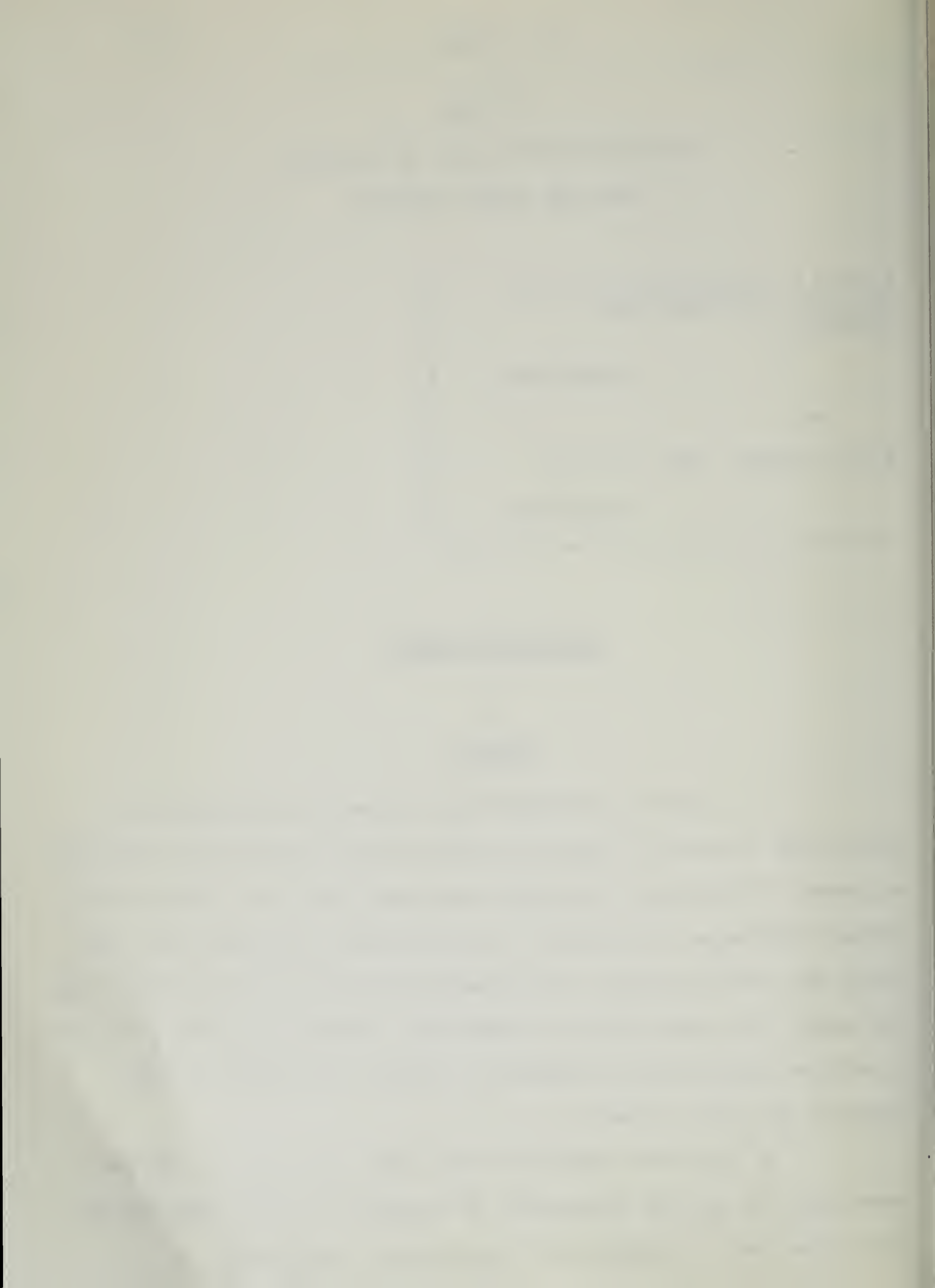
APPELLEE'S BRIEF

I

ISSUES

1. Did the District Court abuse its discretion in dismissing a case (a) where the plaintiffs deliberately disobeyed an order of the Court imposing sanctions for their untimely and sudden discharge of counsel -- an act which frustrated the pre-trial and trial schedule developed by the Court and counsel, and (b) where the plaintiffs, in addition, refused and failed to file a written trial brief by April 27, 1967, the fifth date set therefor by court order?

2. Did the District Court have the power to impose sanctions for an act disruptive of orderly pretrial proceedings which the Court concluded did not warrant dismissal?



3. May a plaintiff, by refusing to obey orders of the Court requiring payment of sanctions and timely preparation of a trial brief, gain quick review of collateral motions not otherwise subject to interlocutory appeal?

4. Did the District Court err in ruling as it did on the collateral motions which plaintiffs seek to appeal?

II

STATEMENT OF THE CASE

Federal Rule of Civil Procedure 41(b) provides in part as follows:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

On December 14, 1966 -- in a case which had been filed almost four years earlier -- appellant Batris W. Perovich suddenly discharged Mr. John Joseph Hall, Esquire, the second attorney to handle the case for him. [R.T. 12/30/66, p. 4, lines 13-17] At this time trial was scheduled for February 13, 1967. Plaintiffs' trial brief, which had to be filed before defendants could write a trial brief and submit motions for summary judgment, etc., was due by December 21, 1966 [R.T. 12/13/66, p. 56, lines 8-9] subject to a modest additional extension of time if required by Mr. Hall. [R.T. 1/17/67, p. 59, line 20 to p. 60, line 1] To permit plaintiffs to find new counsel Judge Pence rescheduled the date for filing the trial brief to January 13, 1967, even though this would probably mean that the trial could not be begun until late March of 1967. [R.T. 12/30/66, p. 16, lines 1-24]

By January 17 the plaintiffs had still not filed a trial brief, although under explicit order of the court to do so or face the possibility of dismissal. On that date, Mr. Perovich' third attorney assured the court that he would "proceed promptly" [R.T. 1/17/67, p. 8, lines 21-24], and estimated that ". . . it will take between sixty and ninety days for me to go through the files and digest the materials with sufficient thoroughness to enable me to file trial briefs in these matters and prepare for trial." [C.T. 3596, lines 20-22] Judge Pence did not dismiss the cases; instead, he ordered the plaintiffs to pay sanctions to the defendants for the time and effort they had unnecessarily devoted to the case as the result of plaintiffs' precipitous and disruptive discharge of former counsel. [R.T. 1/17/67, p. 174, lines 7-12] Plaintiffs were given until April 4, 1967 -- a period of 76 days -- to file their trial brief.

Appellant candidly admits that following the January 17 hearing "two alternatives were open to plaintiffs." [Appellant's Opening Brief, p. 47, lines 3-4] "The first was to . . . attempt to produce within the applicable time limit a trial brief;" in other words, to obey Pre-Trial Order No. 6. [Appellant's Brief, p. 47, lines 4, 8-9] But this would have entailed foregoing three motions plaintiffs wished to make.

As appellant put it, "The second alternative was to bring these matters before the District Court for adjudication, <u>even though preparation of the appropriate motions would require such diversion of time away from the trial brief as to preclude filing it by April 4.</u>" [Appellant's Brief, p. 47, lines 15-18] [Emphasis added] Plaintiff chose to make those three motions

[Appellant's Brief, p. 47, lines 19-20] despite the fact that each had been previously heard by the court [R.T. 12/30/66, pp. 4-40; R.T. 10/3/66, pp. 32-57] or knowingly waived by the plaintiff. [C.T. 3768-3770; R.T. 10/3/66, p. 24, line 10 to p. 30, line 22; R.T. 10/3/66, p. 30, lines 9-20]

In addition, plaintiffs moved for almost five additional months, until September 1, 1967, to complete the trial brief. Although the court denied this motion for an extension, the court did extend the due date for the plaintiffs' trial brief to April 27, 1967 pending determination of plaintiffs' three substantive motions. [R.T. 3/18/67, p. 78, lines 10-13 and p. 80, lines 7-21] Being faced with writing a trial brief, plaintiff once again chose to do otherwise. Plaintiff was again "in a dilemma," as his counsel put it. "He could have dropped everything and devoted all remaining time in the preparation of what he felt, if the motions were denied, would be an inadequate trial brief and which he might not be able to finish on time . . . or he could devote his efforts to salvaging as much as possible through . . . settlements. There being only twenty-four hours in the day, he could not do both."

Appellant continues, "He chose the latter course, [again disobeying a pretrial order] and eventually succeeded in settling substantially all of the claims except those against United. Hence, while he was not working directly on the trial brief, he was working toward resolution of the cases." [Appellant's Brief, p. 49, lines 6-8, 11-17]

On April 7, the last date for payment of sanctions due appellee, plaintiffs' counsel informed defendant's counsel that plaintiffs had decided not to pay the sanctions. [C.T. 3896-3898] A few days later, plaintiffs defiantly gave notice that

they did not intend to pay the sanctions, and that they considered it "futile" to attempt to prepare the trial brief. [C.T. 3877, 3905] Not unexpectedly, the case was ordered dismissed on May 19, 1967. [C.T. 3954]

III

CHRONOLOGY

March 2, 1962 -- Defendants settled prior antitrust case brought by Mr. Perovich for $80,000, receiving a general release. [C.T. 978-979; Affidavit of John J. Hanson, Exhibit A]

March 11, 1963 -- Complaint filed on behalf of Perovich by Richard D. Barger, Esquire of Meserve, Mumper and Hughes [C.T. 2-14]

July 30, 1964 -- John Joseph Hall substituted as attorney for plaintiffs in place of Mr. Barger, who had been discharged. [C.T. 1426-1428]

October 28, 1965 -- Defendants urge trial date of June 20, 1966. [R.T. 10/28-29/65, p. 46, lines 17-18] At plaintiffs' request trial is set for January 30, 1967. [R.T. 10/28-29/65, p. 41, lines 12 to p. 45, line 22]

August 5, 1966 -- Plaintiffs urge January 30, 1967 trial date. Defendants want March. Court sets February 13, 1967. [R.T. 8/5/66, p. 19, line 6 to p. 20, line 8] Trial brief is set for November 28 at Mr. Hall's suggestion. [R.T. 8/5/66, p. 69, line 17 to p. 70, line 3]

October 3, 1966 -- Brief time is reset for December 15, 1966 to allow plaintiffs more discovery time. [R.T. 10/3/66, p. 85, lines 18-22]

December 13, 1966 -- Brief time again reset, this time for December 21, at plaintiffs' request and suggestion. [R.T.

12/13/66, p. 56, lines 8-9]

December 14, 1966 -- Perovich discharges Mr. Hall.

December 30, 1966 -- Brief time reset for January 13, 1967, on penalty of dismissal unless good cause is shown. [C.T. 4086, lines 9-15]

January 17, 1967 -- Mr. Weinstein of McKenna & Fitting appears for plaintiff. [R.T. 1/17/67, p. 4, lines 11-14] The court imposes sanctions. [R.T. 1/17/67, p. 174, lines 11-12]

January 18, 1967 -- Brief time reset for April 1, 1967 [R.T. 1/18/67, p. 9, lines 21-22], soon changed to April 4, 1967 [R.T. 1/18/67, p. 11, lines 5-7; C.T. 3598-3600], affording plaintiffs seventy-six days.

March 10, 1967 -- Plaintiff requests hearing on motion to continue the brief date to September 1, 1967 to allow hearing on three other motions.

March 18, 1967 -- Brief date postponed to April 27. [R.T. 3/18/67, p. 8, lines 7-21]

April 6, 1967 -- Hearing on the other three motions. Court approves various settlements between plaintiffs and various defendants. [R.T. 4/6/67, pp. 54-60]

April 11, 1967 -- Plaintiffs file "Notice of Refusal to Pay Sanctions" [C.T. 3877]

April 12, 1967 -- Defendants serve notice of motion for dismissal. [C.T. 3893-3900]

April 25, 1967 -- Plaintiff belatedly offers to pay sanctions, but only if granted an extension until June 15 to file the trial brief. [C.T. 3933-3936]

May 19, 1967 -- Judge Pence enters order dismissing Perovich cases with prejudice. [C.T. 3954]

DETAILED STATEMENT OF FACTS

This case was dismissed by Judge Pence for plaintiffs' defiant refusal -- not plaintiffs' inability -- to pay sanctions as ordered by the court, and plaintiffs' refusal and unjustified failure to file a trial brief on April 27, 1965, the sixth date set for such brief. Upon the plaintiffs' refusal, the trial court had no alternative but to dismiss the case. The conclusion that this was proper is strengthened by a review of the prior delays in the case and of the almost insuperable task facing the court in extracting a trial brief from plaintiffs.

A. EARLY DELAYS -- FOLLOWED BY TIGHT SCHEDULING.

The complaint in the action on appeal, Civil No. 63-278-MP was filed on March 11, 1963. The attorneys of record at that time were Meserve, Mumper & Hughes with Mr. Richard D. Barger signing the complaint. [C.T. 2-14] Later, Mr. Barger and the firm of Meserve, Mumper & Hughes were discharged as attorneys for the Perovich plaintiffs and John Joseph Hall was substituted in their place. [C.T. 1426-1428]

On January 6, 1965 the three Perovich cases,[1] along with all other pipe cases then pending in the Southern District, Central Division, were transferred to Judge Martin Pence for all further proceedings. [C.T. 1628] At a hearing on October 28, 1965, Judge Pence considered the complex problem of coordinating

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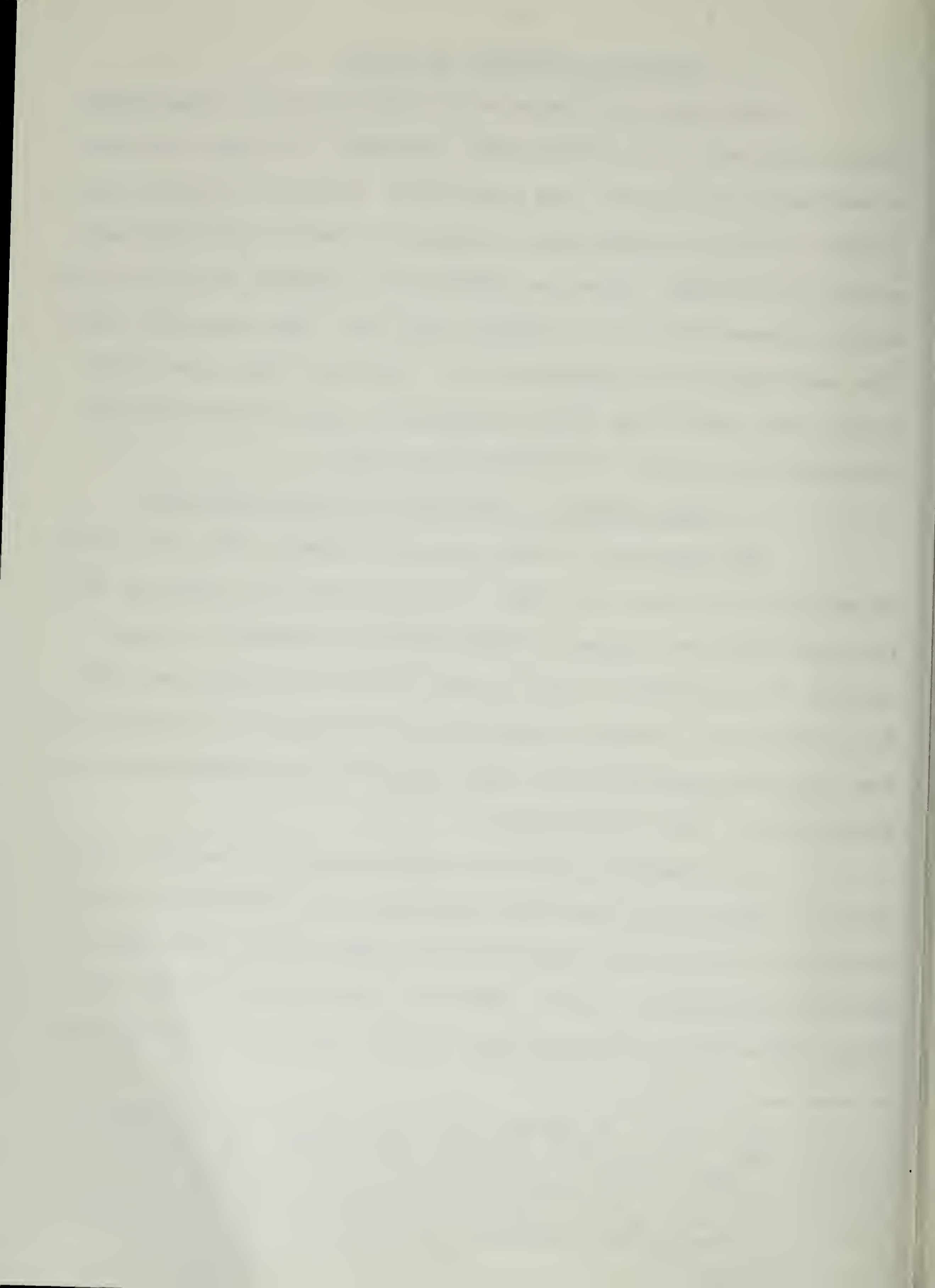
1. The action on appeal, and two companion suits, Northwest Pipe Linings, Inc. v. Pipe Linings, Inc. et al. and Inplace Linings v. Pipe Linings, Inc., et al., U.S.D.C., Southern District of California, Central Division (now Central District of California), Nos. 63-279 and 63-321, respectively, were generally referred to during the pendency of the proceedings as the "Perovich cases."



discovery in the many so-called End-User cases[2] and the No-Joint[3] and Perovich competitor cases, as well as the question of time and priorities between the Perovich and No-Joint cases for purposes of trial. For several reasons the defendants in the Perovich cases, most of whom were defendants in the other cases as well, urged that the Perovich case be tried first, commencing June 20, 1966. The Perovich cases were the first of the many pipe cases which had been filed; the issues and complexity of the Perovich cases were considerably less than the issues and complexity of the other cases; there was much more discovery required by the defendants in the No-Joint cases. [R.T. 10/28-29/65, p. 41, line 12 to p. 45, line 22]

Judge Pence's inclination was also to try the Perovich cases first [R.T. 10/28-29/65, p. 64, line 23 to p. 65, line 1], but Mr. Hall preferred that the No-Joint cases be tried in advance of the Perovich cases. [R.T. 10/28-29/65, p. 46, lines 12-18] Defendants' proposal would have afforded the Perovich plaintiffs a full nine months to prepare their cases. Yet Mr. Hall stated, "But to be realistic about this, I don't think that we could have our trial in June properly prepared." [R.T. 10/28-29/65, p. 46, lines 21-22] As a result, the court set the

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2. The End-User cases were a series of antitrust actions filed by more than three-hundred plaintiffs, mostly public entities, charging concrete and steel pipe manufacturers with violations of the antitrust laws. These cases were consolidated before Judge Pence for all proceedings. [C.T. 3960, lines 13-19] Many of the defendants in the Perovich cases, including United were also defendants in the End-User cases.

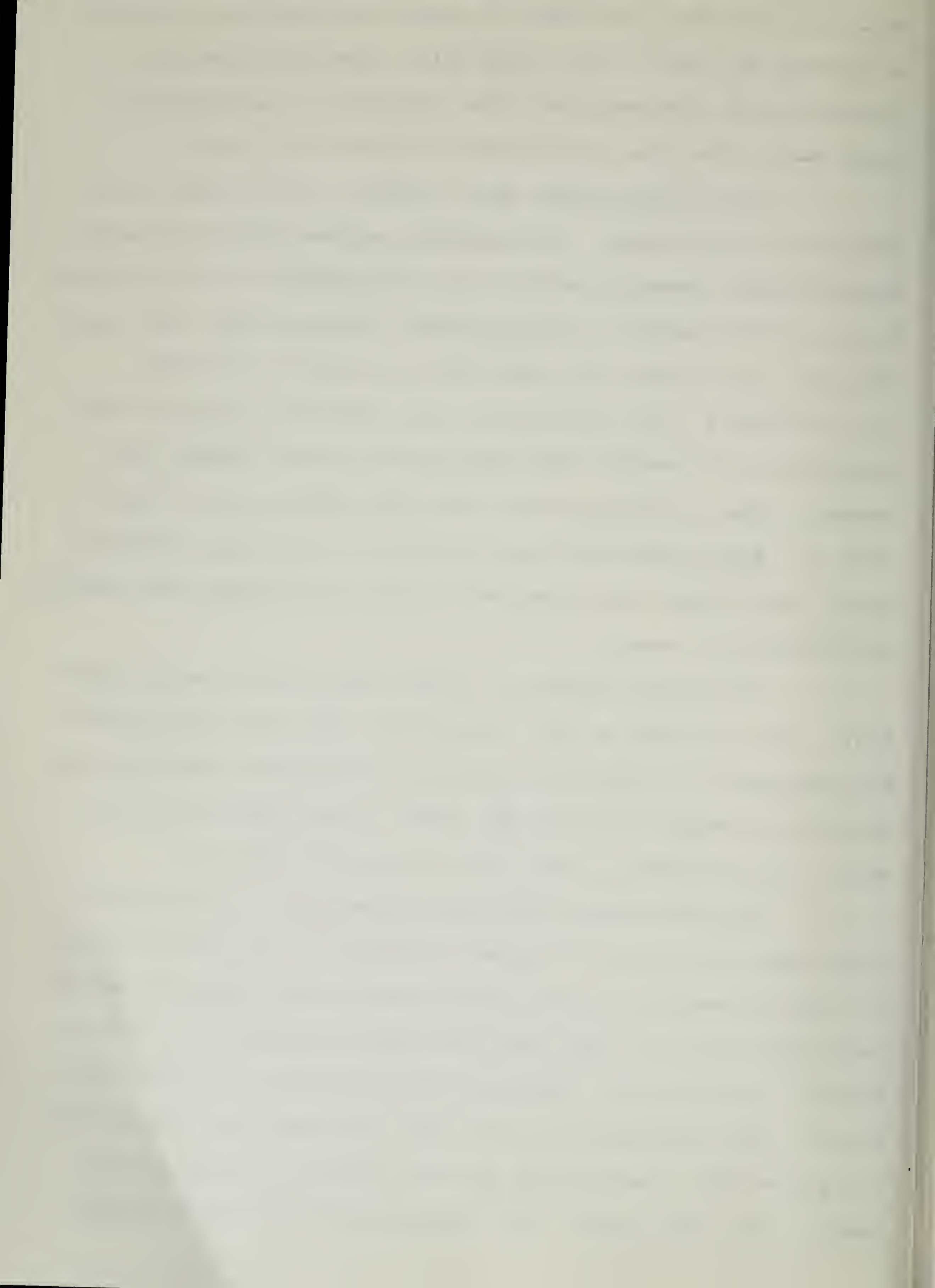
3. The No-Joint cases were several antitrust actions brought by several concerns promoting a novel method of manufacturing concrete pipe against many of the same concerns named as defendants in the Perovich cases.

No-Joint trial for June 1966 and pushed the Perovich trial back to January 30, 1967. [C.T. 2206-2211] Pretrial Order No. 2 suspended most discovery and other activity in the Perovich cases until after the conclusion of the No-Joint trial.

The No-Joint cases were settled by all parties before the June 20 trial date. Consequently, activity in the Perovich cases resumed somewhat earlier than anticipated by Pretrial Order No. 2. At the August 5, 1966 pretrial conference Mr. Hall urged the court to maintain the trial date of January 30, 1967. [R.T. 8/5/66, p. 19, line 20 to p. 20, line 8] In October 1965 plaintiffs had asserted that nine months did not afford them adequate time to prepare their cases for trial; yet in August 1966, Mr. Hall urged the Court to set the trial only six months later, even though there had been no discovery during the pendency of the No-Joint cases.

Defendants proposed a trial commencing in early March 1967. [R.T. 8/5/66, p. 19, lines 6-10] The court set the date for February 13. Plaintiffs agreed to file their detailed trial brief on or before November 28, 1966, a date suggested by Mr. Hall. [R.T. 8/5/66, p. 69, line 17 to p. 70, line 3]

The defendants undertook preparation of the pretrial order hammered out at the August 5 hearing. Even though copies of the proposed order were promptly sent to Mr. Hall, it was not until September 19, 1966, and then only in response to a letter from Mr. Josef Cooper, Administrative Assistant to Judge Pence, that Mr. Hall informed the court that the amount of time allowed for plaintiffs' discovery by Pretrial Order No. 4 was not adequate. [C.T. 3817-3819] The lateness of this letter prompted



Judge Pence to personally write Mr. Hall on September 21, 1966 to advise Mr. Hall that the court was disturbed that he had taken so long to set forth his position. A copy of said letter is attached to this Brief as Exhibit B.

At the hearing of October 3, 1966 Judge Pence granted plaintiffs additional time in which to conduct discovery, and further advised Mr. Hall to apply to the court if the additional time was not adequate. [R.T. 10/3/66, p. 85, lines 7-17] This of course meant that the date by which plaintiffs were to file their trial brief, previously set for November 28, also had to be extended. That date was set for December 15, 1966. [R.T. 10/3/66, p. 85, lines 18-22]

At plaintiffs' insistence the February 13 trial date was retained. Pretrial Order No. 4 set the following schedule. Discovery would be complete by December 7, 1966. On December 15 plaintiffs would file their trial brief. By December 22 defendants would file their contemplated motions for summary judgment. By December 28 the plaintiff would file an answering memorandum. Pretrial conference would be held on December 30, 1966. By January 6 defendants would file their detailed trial brief. By January 13, 1967 plaintiffs were to file their reply brief. Another pretrial conference was set for January 16 and 17, 1967. Other dates related to the designation of depositions and other documents for use at the trial. By February 1, 1967 each party was to file written briefs setting forth objections to deposition testimony and documentary evidence. By February 6 all parties were to file witness lists, proposed jury instructions and court papers. The final pretrial conference would be held February 8 and trial would begin February 13. [C.T. 3202-3209]

Under such telescoped scheduling, it is obvious what would be the result if there were further delays in the submission of plaintiffs' trial brief. Paragraph 13 of Pretrial Order No. 4 sets forth the requirements plaintiffs were to meet in filing their written brief:

> "13. On or before December 15, 1966 plaintiffs shall file a detailed written trial brief containing separately numbered paragraphs and setting forth:
>
> > "a. The facts which each plaintiff expects to prove in support of each claim for relief, distinguishing between those facts which plaintiff contends, on the basis of the answers, or otherwise, are admitted and those which are contested;
> >
> > "b. The legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions as to its theory and measure of damages pertaining to each claim and the party bearing the burden of proof on each issue. Plaintiff's contentions as to the measure of damages should include a detailed, narrative statement of all expert testimony plaintiff proposes to introduce at trial."
>
> [C.T. 32-3-3204]

The timely filing of this trial brief was vital. Defendants contemplated motions for summary judgment could best be evaluated against plaintiffs' written trial brief, which was

to treat in detail the facts and contentions plaintiff intended to prove. Furthermore, defendants obviously could not write their trial brief until they had sufficient time to review and digest plaintiffs' brief. To the extent the time for filing plaintiffs' trial brief was delayed, it became more and more difficult to retain the February 13 trial date.

B. PLAINTIFF AGAIN HAS THE DATE FOR THE BRIEF POSTPONED.

The first postponement in the due date for the trial brief -- from November 28 to December 15 -- has already been described. At a hearing held on December 13, 1966 Mr. Hall indicated that, "he would need a few more days" to complete the plaintiffs' trial brief. The Court responded as follows:

> "THE COURT: How many days do you feel that you will need, because as soon as that takes place, then everything else starts blocking backwards from that. Now, do yourself a real analysis and come up with a realistic figure based upon your own estimate of what you feel that you need.
>
> "MR. HALL: December 21, the end of that day.
>
> * * * *
>
> "THE COURT: Okay. The 21st is the date you set for yourself, 4:30 p.m. on the 21st."
>
> [R.T. 12/13/66, p. 54, line 22 to p. 55, line 2 and p. 56, lines 8-9]

At the conclusion of the hearing on December 13, defense counsel were asked by Mr. Josef Cooper, Administrative Assistant to Judge Pence, to give Hall additional time to file

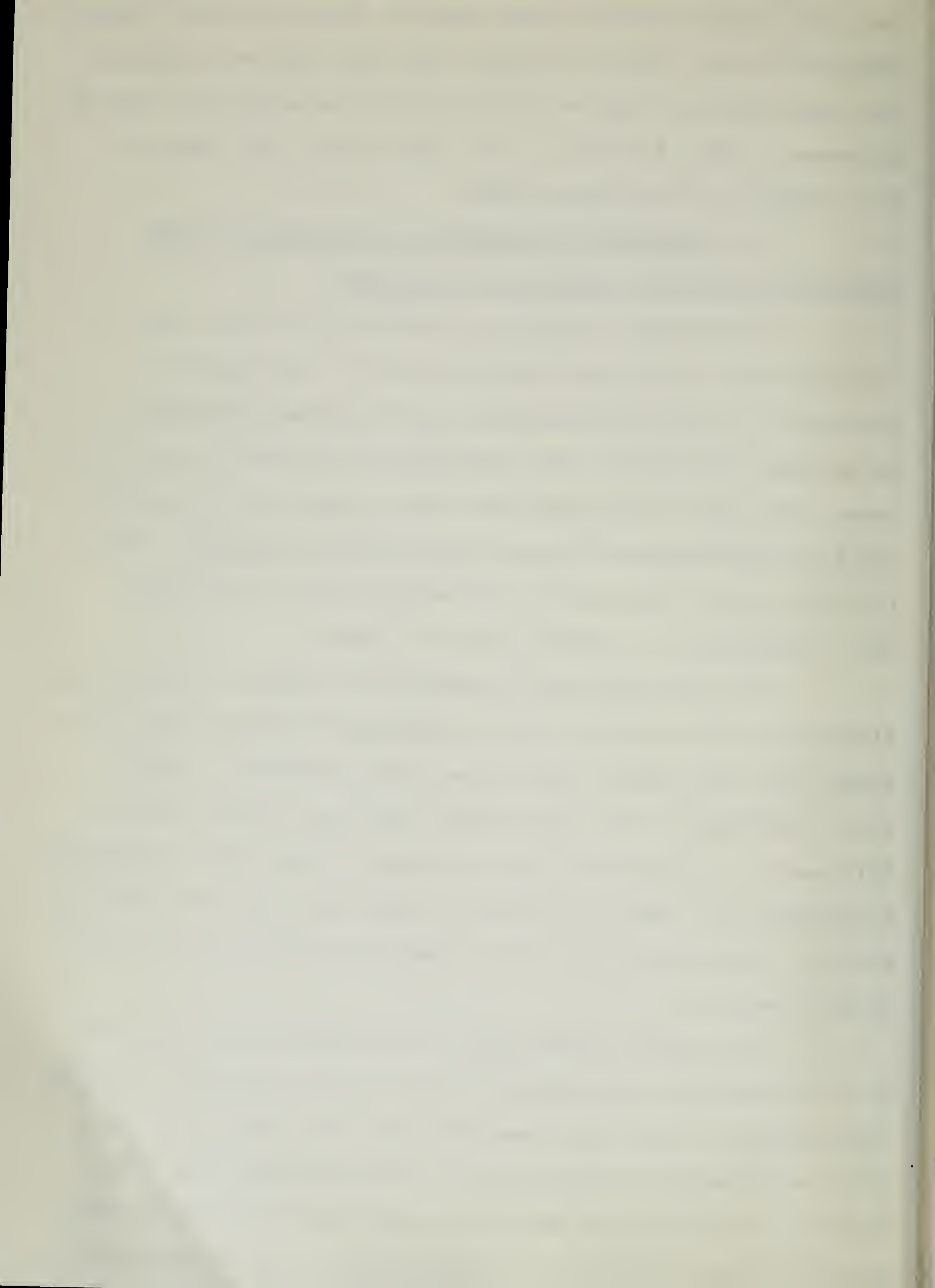
his trial brief, setting a date early in January if Hall desired additional time. Defense counsel understood that Mr. Hall had also been informed that he could request some additional time if necessary. [R.T. 1/17/67, p. 59, line 20 to p. 60, line 1; R.T. 3/18/67, p. 36, lines 13-20]

C. PLAINTIFF'S DISCHARGE OF HIS SECOND ATTORNEY FURTHER POSTPONES THE DUE DATE OF THE BRIEF.

On December 15 defense counsel met with Mr. Hall to reschedule the filing date for plaintiffs' trial brief, if necessary. At that conference Mr. Hall informed defendants that he had been discharged by Mr. Perovich as attorney in two of the cases. Mr. Hall so informed the court, saying that he probably would be discharged as counsel for the third plaintiff. [R.T. 12/30/66, p. 4, lines 13-17] In fact he was so discharged. [R.T. 12/30/66, p. 6 line 21 to p. 7, line 1]

At a hearing held on December 30, 1966, in view of the fifteen days that had been lost, defendants proposed that plaintiffs file their trial brief on or before January 13, 1967. [R.T. 12/30/66, p. 14, lines 5-16] This gave plaintiffs two full weeks -- a period of time in excess of the time Mr. Hall had on December 13, when he promised to file the trial brief by December 21. Defendants could only assume that the trial brief was nearly complete.

One of the reasons why it was particularly important that the Perovich cases adhere closely to the pretrial schedules established by court order was the fact that these cases were only one of many involving most of the same defendants. The burden on the court and defense counsel was particularly great because of the pendency of a contemplated series of many trials,



involving many of the same defendants, immediately after the Perovich trial. It was thus important that the Perovich cases not be delayed. When it became apparent during the December 30, 1966 hearing that the new date of January 13 for the filing of plaintiffs' trial brief would necessarily push the trial date back to late March 1967, neither defense counsel nor the court were pleased. [R.T. 12/30/66, p. 16, lines 1-24] Another hearing was scheduled for January 17, 1967. [R.T. 12/30/66, p. 32, lines 11-12]

D. PLAINTIFF'S THIRD ATTORNEY OBTAINS "GENEROUS" POSTPONEMENT.

By January 17 plaintiffs had not filed their trial brief, although under explicit order of court to do so or face the possibility of dismissal. At a hearing on that date Mr. Weinstein of the firm of McKenna & Fitting appeared on behalf of the Perovich plaintiffs. [R.T. 1/17/67, p. 4, lines 11-14] He explained that he had informed the plaintiffs that he would represent them only if the court granted him and his associates sufficient time to familiarize themselves with the files and prepare the case fully. [R.T. 1/17/67, p. 7, lines 5-11] Mr. Weinstein filed in open court his affidavit [R.T. 1/17/67, p. 7, lines 12-21] in which he stated under oath:

> "5. I anticipate that it will take between 60 and 90 days for me to go through the files and digest the materials with sufficient thoroughness to enable me to file trial briefs in these matters and prepare for trial."
>
> [C.T. 3596, lines 20-22]

Mr. Weinstein represented that he was "very aware of the burden that any lawyer takes when he comes into the middle of an antitrust case of this magnitude . . . ." [R.T. 1/17/67, p. 8, lines 4-6] He explained that he had told his clients that he did not believe the cases would be dismissed if the court "had some assurance that they intended to proceed promptly henceforth." [R.T. 1/17/67, p. 8, lines 21-24]

Later in the course of the same hearing Mr. Hall, former counsel for the Perovich plaintifs, testified that in his opinion it would take new counsel familiar with the antitrust laws about 40 working days to review and digest the files, and prepare the trial brief required by the pretrial order. [R.T. 1/17/67, p. 82, lines 13-24] (Mr. Weinstein's estimate was based on calendar days.) [R.T. 1/17/67, p. 175, line 5]

On the morning of the 18th plaintiffs' and defendants' counsel met to reschedule the already much delayed trial brief, but were unable to agree on the number of days that should be allotted to plaintiffs to file the brief. Defense counsel proposed twenty to thirty days and plaintiffs' counsel demanded ninety. [R.T. 1/18/67, p. 4, lines 1-6] Upon being told of the controversy, Judge Pence stated, "My sympathy is with Mr. Weinstein . . . ." [R.T. 1/18/67, p. 8, lines 21-22] At first the court gave plaintiffs until April 1 to file their trial brief, telling Mr. Weinstein, "If you want to undertake it in that length of time, it's yours. If you say you can't do it in that period it is not yours." [R.T. 1/18/67, p. 9, lines 21-24] Later during the same hearing, the court added three extra days making the filing time April 4. Thus the court afforded plaintiff seventy-six days or fifty-five workdays in which to complete their

trial brief -- a period of time fifteen days in excess of the time Mr. Hall had estimated under oath would be required to complete the brief. [R.T. 1/18/67, p. 11, lines 5-7]

Mr. Weinstein seemed to be perfectly happy with the new limit. "I think April 4 is acceptable, I think that is no problem." [R.T. 1/18/67, p. 11, lines 16-17] Later he underscored his opinion, "I think your Honor has been more than generous." [R.T. 1/18/67, p. 12, lines 13-14] He added that he would recommend to plaintiffs that they let him take the cases, and again reiterated, " . . . I think it is fair." [R.T. 1/18/67, p. 12, lines 18-20]

At this time there was some uncertainty as to when the Perovich cases could be tried, but the court made it clear that in any event it wanted to resolve the impending summary judgment motions by the first or middle of May 1967. [R.T. 1/18/67, p. 12, lines 9-12] The uncertainty as to trial date stemmed from a trial scheduled before Judge Pence in an unrelated matter. Since there is always a substantial possibility that any action might be settled before reaching the trial stages, it made sense in any event to proceed as rapidly as possible to prepare the Perovich cases for trial. That point was explicitly made by defense counsel. [R.T. 1/18/67, p. 12, lines 2-8]

Pretrial Order No. 6, which summarized the results of the January 18 hearing, required plaintiffs to file their brief by April 4, 1967 and required defendants to file their motions for summary judgment by April 18. [C.T. 3598-3600]

At the hearing on January 17, 1967, the court declined to dismiss the case but because counsel for the defendants had been "put through an enormous amount of time, trouble and effort

". . . ," primarily in preparing for two unnecessary hearings brought about by plaintiffs' untimely discharge of counsel, the court imposed sanctions upon plaintiffs. [R.T. 1/17/67, p. 174, lines 8-12]

E. RATHER THAN WRITE THE PRETRIAL BRIEF, PLAINTIFF CONCENTRATES HIS EFFORTS ON VARIOUS COLLATERAL MOTIONS PREVIOUSLY DETERMINED OR WAIVED; NEVERTHELESS PLAINTIFF WINS A FIFTH DELAY.

Appellant's Opening Brief admits that plaintiffs could have filed a trial brief by April 4. [p. 47, lines 16-18] "Undoubtedly this would have been the course of least resistance for plaintiffs' counsel." [p. 47, lines 9-10] Appellant's Brief does not point out, however, that each of the three motions on which plaintiffs deemed it wiser to spend his time had been rejected by the court or had been knowingly waived by prior counsel.

"On March 14 and 17, respectively, plaintiffs filed a complex of four (4) motions aggregating in excess of 100 pages." [Emphasis added] [Appellant's Opening Brief p. 47, lines 19-20] This was the result of the "diversion of time away from the trial brief . . . ." [p. 47, line 17] At a hearing held on March 18, 1967, plaintiffs moved to continue the April 4 trial brief date to September 1.

Plaintiffs' three motions (other than to extend the time for the trial brief) were as follows:

1. A motion for leave to amend the complaint to state a Sherman Act Section 2 charge;

2. A motion to modify the protective order regarding defendants' competitively sensitive documents; and

3. A motion to reconsider the court's prior ruling regarding the relevance of evidence of agreements affecting the

sale of concrete pipe.

Each of these motions which plaintiffs sought to raise, with the resulting delay in filing the trial brief, had been either considered and resolved by the court in the past or knowingly waived by plaintiffs. Plaintiffs were trying to justify a fifth extension of time for filing their trial brief because new counsel, brought in after the case was fully prepared, wanted to back up and redo the work of prior counsel.

Plaintiffs' proposed motion to amend to allege a violation of Section 2 of the Sherman Act had been contemplated by former counsel. On September 19, 1966, Mr. Hall in a letter to the court proposed that a hearing be held on October 18, the agenda to include, "Plaintiffs' Motion for Leave to File Supplemental and/or Amended Complaints." [C.T. 3768-3770] At a hearing held on October 3, 1966 Mr. Hall confirmed that it was his intention to amend the complaints to allege a Section 2 violation. [R.T. 10/3/66, p. 24, line 10 to p. 30, line 22] Because of the far-reaching implications of the proposed amendment, especially at such a late date in the cases, defense counsel advised the court of their intention to oppose any such amendments, and requested that the motions be made promptly. Mr. Hall said he would file them by October 12. [R.T. 10/3/66, p. 27, lines 3-5] When a question arose whether plaintiffs' proposed filing date of October 12 for their amended complaints and accompanying motions would afford defendants ample time to respond before the proposed October 17 or 18 hearing, the court, rather than impose a deadline, warned counsel for plaintiffs:

"THE COURT: Well, I will simply put it like this: I will let Mr. Hall go ahead and file

"that any time. Maybe it won't be heard on the 17th. Courts always take into consideration the matter of prejudice to the file date to opposing counsel, to every factor which involves prejudice to the orderly disposition of the case, prejudice to opposing parties in the process of the orderly disposition of the case.

"Now, with those Delphic words now in the record, Mr. Hall, you don't have to file it by the 10th or 12th or any other particular date. Whenever you get ready you file it."

[R.T. 10/3/66, p. 30, lines 9-20]

Mr. Hall never filed the proposed amended complaints. In view of the plaintiffs' conscious decision to abandon any attempt to amend their complaints to state a Section 2 charge, it is axiomatic that plaintiffs should not more than six months later, on the eve of the date for filing their trial brief, have been permitted to so amend their complaints, much less lean upon that intention as a reason to extend the time to file their already four-times delayed trial brief.

Plaintiffs' motion to modify the protective order regarding defendants' competitively sensitive documents merely revived a matter which had been fully considered at the hearing of December 13, 1966. [R.T. 12/13/66, pp. 4-45] The motion to reconsider the court's prior ruling regarding the relevance of evidence of agreements affecting the sale of concrete pipe concerned an issue which had been fully argued at a hearing on October 3, 1966. [R.T. 10/3/66, p. 32-57] Put simply, plaintiffs were attempting to justify another disruptive delay in the orderly

matters former counsel had argued and lost, or waived.

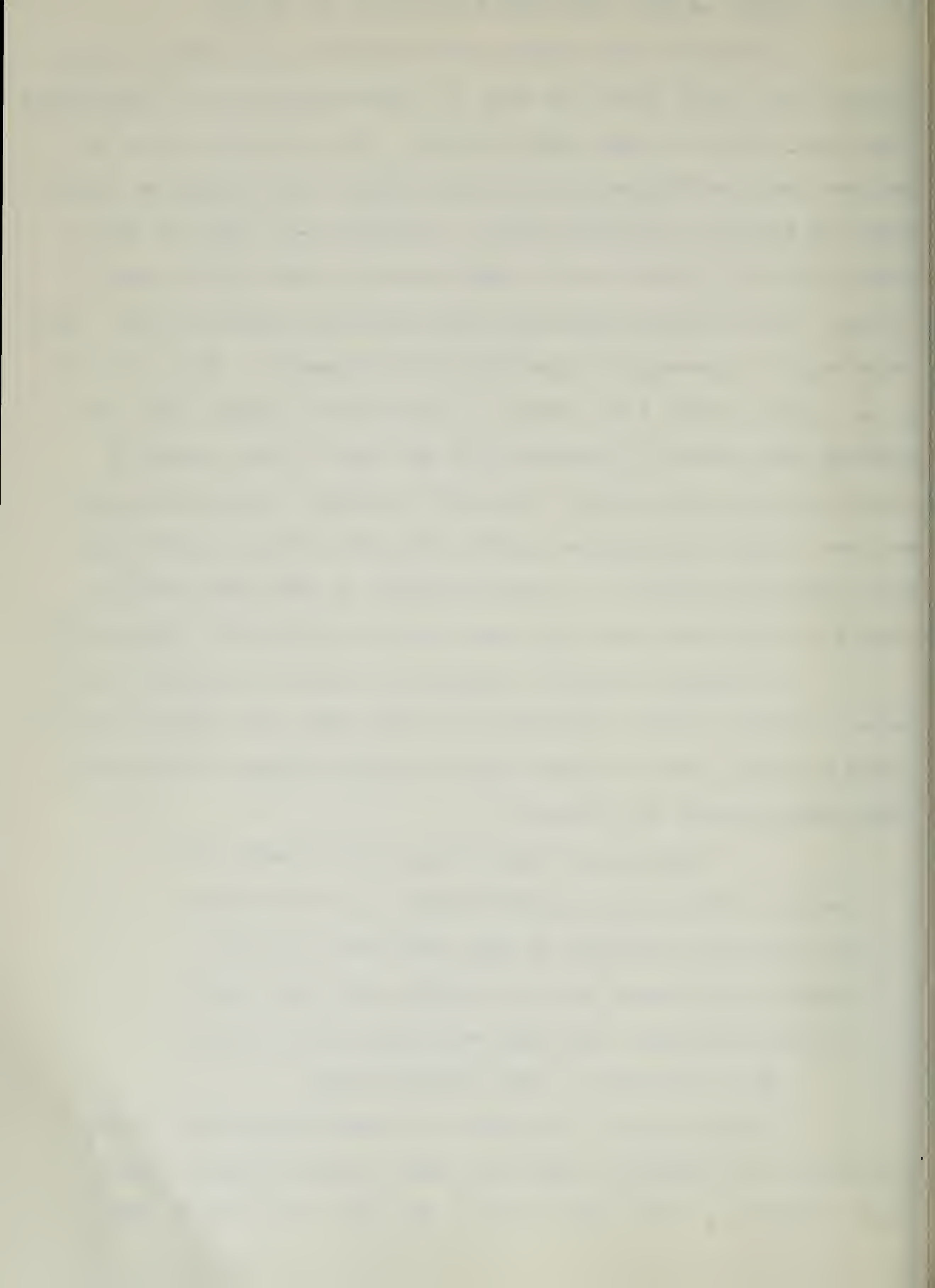
Plaintiffs had waited until March 10, less than a month before their trial brief was due, to inform the court and defendants that they wished to make these motions. Yet at least two of the motions had been contemplated by new counsel even before he undertook the Perovich representation. On January 13, 1967 Mr. Weinstein told Mr. Cooper that he might seek to undo certain prior rulings, specifically mentioning the protective order and the order relating to relevancy of concrete pipe agreements. [R.T. 1/17/67, p. 41, lines 17-20; C.T. 3760] If plaintiffs' counsel felt such motions were crucial, why were they not made at the outset of the seventy-six day period? Counsel's failure to promptly pursue motions he had contemplated making from the outset, was all the more reason why counsel's belated attempt to make such motions should not have postponed the due date for plaintiffs' trial brief.

In January, when Mr. Weinstein initially appeared in the cases, defense counsel apprised the Court that new counsel had indicated he might seek to reopen certain prior rulings of the court. Judge Pence stated as follows:

> "Counsel did this matter of reopening discovery. That's gone by the board. I am not going to start the pretrial of this case and all of the pretrial discovery all over again, with due regard to Mr. Weinstein, and what may be his necessities."

[R.T. 1/17/67, p. 176, lines 17-21]

Yet the court, in order to be absolutely fair to the plaintiffs, set April 6, 1967 as a date to hear these motions. [R.T. 3/18/67, p. 77, line 24 to p. 78, line 7] At that time,



motions, the court made its Koufax analogy [R.T. 3/18/67, p. 79, line 22 to p. 80, line 2] and since a possible favorable response to plaintiffs' motions would necessarily result in a postponement of the time for the trial brief, the court extended the due date -- for the fifth time -- to April 27, 1967. [R.T. 3/18/67, p. 80, lines 20-21].

At the same time the court set April 6 as the due date for the payment of sanctions. [R.T. 3/18/67, p. 83, lines 4-6].

Plaintiffs' moving papers were devoid of any showing of good cause, disregarding their three proposed motions, why the trial brief should not have been prepared by April 4, 1967, nor did counsel represent that he would have been unable to file the trial brief by this date if he had been compelled to do so. In fact there was no reason why the brief should not have been completed by April 4. The voluminous files plaintiff now hides behind were an illusion. They were stuffed with old motions to compel attendance of witnesses, abortive motions by plaintiffs for sanctions, four-year-old motions to stay discovery pending the grand jury investigation, motions to unseal the Government's sentencing memorandum in criminal cases, etc. Such moot disputes constituted the overwhelming bulk of the court files in these cases. They needed to be read only once, briefly (if at all), and disregarded.

Moreover, by virtue of Mr. Weinstein's extensive anti-trust experience, he should have been eminently qualified to cut through the chaff to the grain of the case. [C.T. 3642-3643] In fact if counsel for plaintiffs was finding it difficult at that time to prepare the trial brief, it was because inadequate time had been devoted to the project. At the time plaintiffs' motion to continue the trial brief was filed, Mr. Weinstein had devoted

only 160 hours to the Perovich cases. This certainly did not rise to the level of the prodigious effort defendants and the court had every right to expect. [C.T. 3644] Although Mr. Weinstein, according to his own affidavit, had worked a portion of every weekend since January 10, he had averaged only two and a half hours per day on the Perovich cases. Obviously a large portion of that time was spent appearing in court all day on January 17, meeting with defense counsel and appearing in court on January 18, and preparing a motion for an extension of time as well as preparing the other three motions plaintiffs filed before the March 18 hearing. Perhaps it was indicative of the extent of new counsel's effort that not until March 16 had he visited defendants' document depository, where the documents produced for plaintiffs were located, and even then he stayed for only forty-five minutes. [C.T. 3763]

The prejudicial effect which the delay until September 1967 would have had on defendants was very real. The expense in attorneys' fees and defendants' time to refamiliarize counsel and witnesses with the factual matters at issue in the actions would have been substantial if the cases had been suspended for another five months. Counsel was then reasonably acquainted with the depositions and other discovery and could not have been expected to have retained close working knowledge of the cases during the proposed five-month hiatus.

Defendants' attorney fees would not have been the only cost to defendants of further delay. The many key representa-tives of defendants who would have been witnesses at trial were then familiar with the facts, which dated back to the early 1960's. They had been deposed at length during October and November 1966

and in that connection had conferred with counsel and reviewed facts and records. The benefit of this substantial preparation would have been almost totally dissipated if another five-month delay had been grafted onto the already delayed progress of the cases. Instead, these many witnesses, after a span of five months, would have had to dedicate great slices of their time to review facts and duplicate work now reasonably fresh in their minds. The witnesses who would have had to review prior testimony and spend large amounts of time with counsel were not low-level employees but rather the presidents of two corporate defendants and a score of vice presidents, executives and manager [R.T. 3/18/67, p. 53, line 13 to p. 54, line 24] The impact of the requested extension upon the corporate and management personnel of the six defendants, although incalculable in dollars and cents, would have been very real and very prejudicial.

These factors were recognized by Judge Pence, who agreed that the delay had prejudiced the orderly and proper disposition of the cases. He further recognized the prejudicial effect of such delays upon defendants.

> "I find that the delay which has taken place has certainly prejudiced the orderly and proper disposition of these cases. The statements made by Mr. Cooper regarding the preparation of clients and the preparation of counsel for trial, the statements made that demand a complete review of all that has been done, even now, because of the delay that has taken place, all of those are very real and very true and are prejudicial because somebody pays the bill because every time you read

"a document or review your notes, you use that much time out of your life simply to make sure that you have properly refreshed your mind."

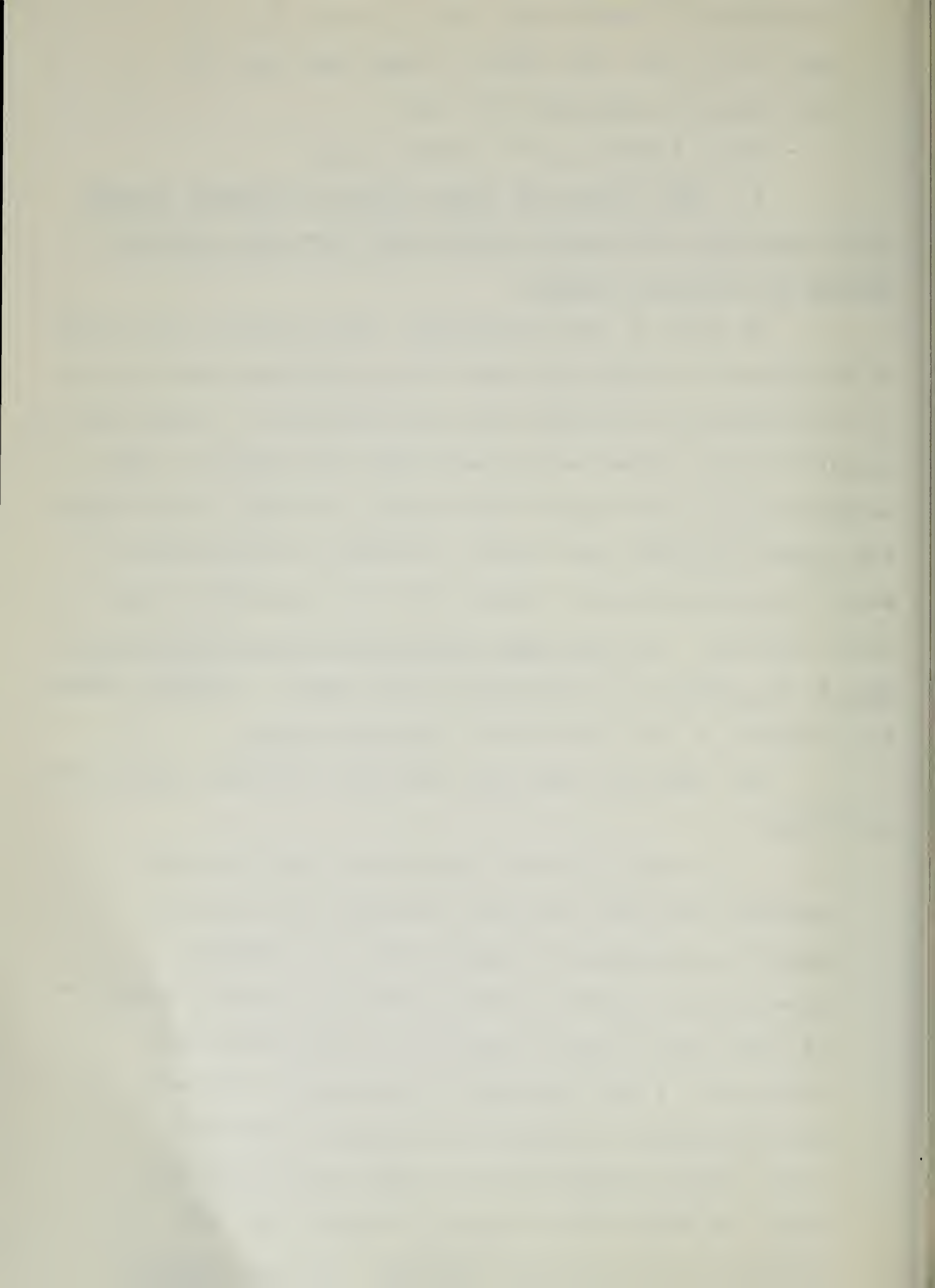
[R.T. 3/18/67, p. 78, lines 14-25]

F. <u>UPON LOSING HIS THREE MOTIONS, PLAINTIFF REFUSES TO PAY SANCTIONS OR PROCEED FURTHER WITH THE CASE, DEMANDING INSTEAD HIS APPELLATE REMEDY</u>.

On April 6, 1967 plaintiffs' three motions were denied. At this point Mr. Weinstein asked for an additional day in order to decide whether plaintiffs would pay sanctions "I would like to consult with Mr. Brown and at least have the ability to make a telephone call to my client this evening, in light of the changing posture of number two motion, in order to decide what he wants to do, and frankly, whether he is in a position to pay those sanctions. <u>We have made preparations, too, for us to pay them in the event it is necessary to the case</u>." [Emphasis added] [R.T. 4/6/67, p. 50, lines 2-8] afternoon session

Mr. Weinstein made the plaintiffs' position quite clear, as follows:

" . . . it deals with the possibility that Davin and Perovich and their attorneys concluded that we, perhaps in our erroneous judgment, but our judgment nonetheless, honestly believe that your Honor's rulings of today are of such a nature as to completely hamstring us. I will be frank in telling you that we have seriously considered not paying the sanctions to Mr. Cooper, hoping that we might be able to convince the Ninth Circuit Court of Appeals that the sanctions were improperly imposed. And that together



"with certain other rulings, together with the ruling with the time of the briefs imposed such a tremendous burden on us that it was not fair to ask Mr. Perovich and Davin to continue to incur this tremendous legal expense necessary to create this brief, which we believe in our judgment that the rulings prevented from being a brief which will be enough to win a case."

[R.T. 4/6/67, p. 51, lines 1-15] (Afternoon session)

At this point Mr. Weinstein in effect asked the court to say that if plaintiffs did not pay the sanctions then the case would be dismissed promptly so that Mr. Cooper would not be in a position of arguing that the case was also dismissed for failure to file the trial brief. [R.T. 4/6/67, p. 51, lines 16-24] (Afternoon session) The court declined to give Mr. Weinstein any such assurances:

"And I will until the case is at a definite posture, not only one leg, but two, the second leg. This can, if at this time I should dismiss, be reversed for imposing a sanction or dismissal for failing to say [sic] $600. The ultimate result would be if I were reversed that you would have had how much time?

"MR. WEINSTEIN: I don't know what the backlog is on the Ninth Circuit, your Honor.

"THE COURT: Let's call it six months.

"MR. WEINSTEIN: All right.

"THE COURT: So that you would have gained over six months and the risk of dismissal for $600 is

"one of these calculated risks. * * *"

[R.T. 4/6/67, p. 53, lines 8-20] afternoon session

On that same day, April 6, 1967, at approximately 4:15 p.m., the law firm of McKenna & Fitting delivered a check drawn on its account in favor of Gibson, Dunn & Crutcher in the amount of $656.15, the amount of the sanctions due United. [C.T. 3899] Later that same day Mr. Weinstein personally informed Robert Cooper that his firm had sent a check to Gibson, Dunn & Crutcher that afternoon in the amount of the sanctions due United. Mr. Weinstein requested Mr. Cooper not to negotiate the check, rather to hold it until Mr. Weinstein advised Mr. Cooper whether to cash it as payment of the sanctions due or to return it to Mr. Weinstein. In explanation, Mr. Weinstein said only that his clients had not yet decided whether or not they intended to pay the sanctions. [C.T. 3896-3898]

On the afternoon of April 7, the day the sanctions were due, Mr. Weinstein advised Mr. Cooper that he had talked to his clients and it was their decision not to pay the sanctions. Accordingly, he requested Mr. Cooper to return the check to McKenna & Fitting, and the check was returned on that date. [C.T. 3896-3898]

Within a few days, on April 11, plaintiffs filed an unusual document boldly entitled, "Notice of Refusal to Pay Sanctions." In that document, plaintiffs formally advised the Court that they had refused to pay the sanctions due United for three stated reasons:

"1. The order requiring the plaintiffs to pay sanctions exceeded the power of the Court;

"2. The plaintiffs were financially unable

"to pay the sanctions within the time ordered;

3. The orders of the Court setting the time for preparation of trial briefs, denying the plaintiffs personal access to the documents produced by the defendants, and limiting discovery into evidence of conspiracy as it affected the current [sic] pipe industry so hampered the preparation of the plaintiffs for trial that it would have been a futile effort to pay said sanctions in order to avoid dismissal."

[C.T. 3877]

The third reason was obviously plaintiffs' real one. The validity of the first reason will be discussed infra, in Part V-B. Plaintiffs' alleged financial inability to pay sanctions will be discussed later in this Part, but suffice it to say here that on April 6 plaintiff did not ask the court to grant more time in which to raise money to pay the sanctions even though on that very day the court approved settlements involving the payment of large sums of money to plaintiffs. [R.T. 4/6/67, pp. 54-60] Plaintiffs' third reason for not paying sanctions was plaintiffs' disagreement with the court's ruling on other motions. Plaintiff's language indicated that the plaintiffs had no intention of filing a trial brief and proceeding further with the case.

On April 12, 1967 defendant United served a Notice of Motion and Motion for Dismissal with Prejudice of the Perovich actions on the grounds that (1) plaintiffs had refused to pay the sanctions, (2) plaintiffs were unwilling to prosecute the cases in accordance with existing time schedules and other orders of the court, and (3) plaintiffs had formally advised the court

in their Notice of Refusal to Pay Sanctions that they would not file their trial brief on or before April 27. [C.T. 3893-3900]

In a document filed April 19, 1967, plaintiffs responded to United's motion for dismissal. In that document plaintiffs set forth in undisputedly clear terms their reasons for refusing to pay the sanctions:

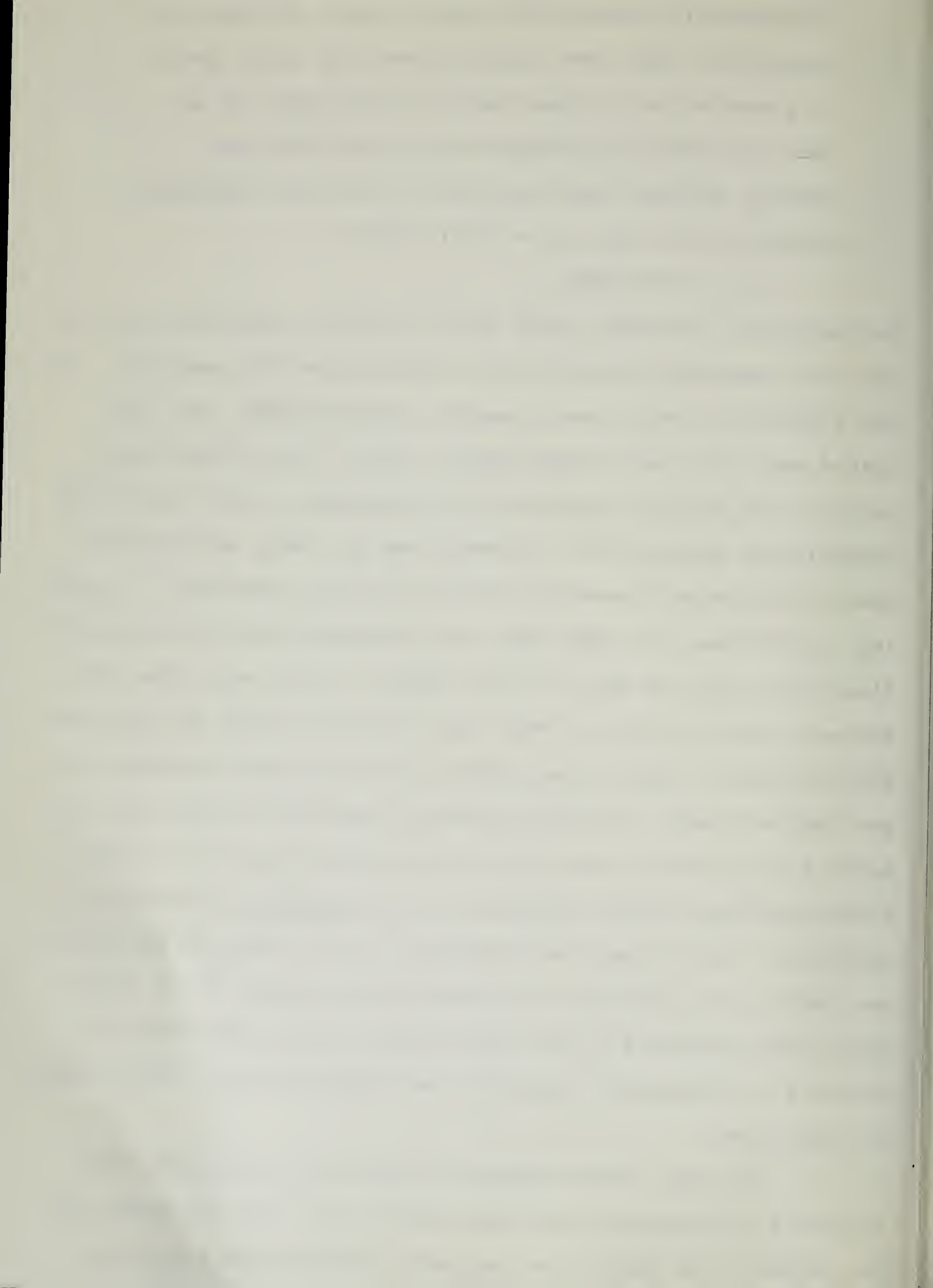
> "The plaintiffs reasons for not paying the sanctions were set forth in the Notice of Refusal to Pay Sanctions. Basically, the plaintiffs' position is, as was expressed to the Court, <u>a desire to seek their appellate remedy with regard to the imposition of sanctions and the other rulings of the Court</u> concerning the enlargement of time to file a brief, the scope of the Court's protective order, the ruling with regard to the amendment of the pleadings and certain discovery matters. The plaintiffs believed that the circumstances were such that the payment of sanctions would have been a futile act since the Court has made clear that it would dismiss the three plaintiffs' cases unless a trial brief was filed on April 27, 1967. Because of the plaintiffs' financial positions, and their belief that the rulings of the Court were incorrect, they desire to seek their relief in the appellate court rather than engage in what they believe to be the futile act of trying to prepare a brief hampered by the limitations on discovery, limitations on access to documents and the limitations of time concerning the preparation of that trial brief.
>
> " * * * The plaintiffs' desire to avoid

"incurring the necessarily large expense involved in preparing a less than complete pre-trial brief prior to a resolution of these appeals since they are of the view that the rulings made by the Court have already impaired their ability to fully and adequately present their cases in a trial brief."

[C.T. 3905-3906]

In plaintiffs' response filed April 19, 1967, plaintiffs did not take the position that they were unable to pay the sanctions. In the affidavit of Mr. Brown, counsel for plaintiffs, Mr. Brown stated only that on or about April 4 and 5, two or three days prior to the date for payment of the sanctions, that counsel had communicated with both Mr. Perovich and Mr. Davin and inquired whether they were financially able to pay the sanctions. According to Mr. Brown, at that time, each responded that they were not financially able to do so. [C.T. 3907] It was only later, in a document filed April 25, 1967, that plaintiffs took the position that on April 7, 1967, they did not have the funds available to pay the sanctions. In that document, plaintiffs stated that on April 7 "settlements were in midstream with respect to certain other defendants which settlements were <u>thereafter</u> to generate sufficient cash to pay the sanctions." At no time did plaintiffs set forth in an affidavit or otherwise the amount of the funds which were generated by the settlements, or the dates when the checks from defendants Centriline and American were received and/or negotiated.

To some extent defendant United is in the dark with respect to plaintiffs' financial ability to raise the small sum due United as of April 7 on the basis of their own assets or



funds, although plaintiffs' contention that they lacked the funds seems incredible. Mr. Davin, the proprietor of Inplace Linings Incorporated, at that time owned and operated a two-engine airplane and lived on a tree—lined estate overlooking a lake. Similarly Mr. Perovich received a substantial annual income from certain gravel pit operations and owned a substantial equity in a luxury home in San Marino, California. These two points were made in Defendants' Memorandum in Opposition to Plaintiffs' Memorandum re Payment of Sanctions and Filing of Trial Brief, filed on April 28, 1967, and they were not disputed by plaintiffs. [C.T. 3942-3943] In addition, Mr. Perovich had received $80,000 paid by some of the same defendants in the action in March 1962 in connection with the settlement of an earlier, similar antitrust action. [Affidavit of John J. Hanson, Exhibit A]

Furthermore, appellant's contention that he was without funds on April 7, and similar contentions as to the amounts that he had spent prosecuting the case [Appellant's Opening Brief, p. 34, line 26], should be taken with a healthy dose of salt in light of Mr. Perovich's history of making false and incredible statements. The best example of this is contained in Perovich v. Glens Falls Insurance Company (9th Cir. 1968) 401 F.2d 145, another action involving Mr. Perovich. Key passages from the opinion follow:

> "In 1961, Glens Falls Insurance Company paid Batris W. Perovich $10,268.35 to compensate him for the theft of equipment insured by Glens Falls. Glens Falls later discovered that Perovich had made numerous material misrepresentations of the value of the stolen goods. Under the terms of the insurance contract, these

"misrepresentations voided the contract, and Glens Falls sued for a refund. Perovich appeals from the judgment entered on the jury's verdict for Glens Falls.

"Perovich first contends that there was insufficient evidence that he misrepresented value. There is no merit in this contention. The evidence shows that one man who worked four hours and used materials which cost less than $200 made equipment which Perovich valued at $1,100.00. Perovich's original estimate for the entire loss was $3,500.00. Even though Perovich subsequently told a deputy sheriff that much of the equipment had been recovered, his final claim exceeded $10,000.00

* * * *

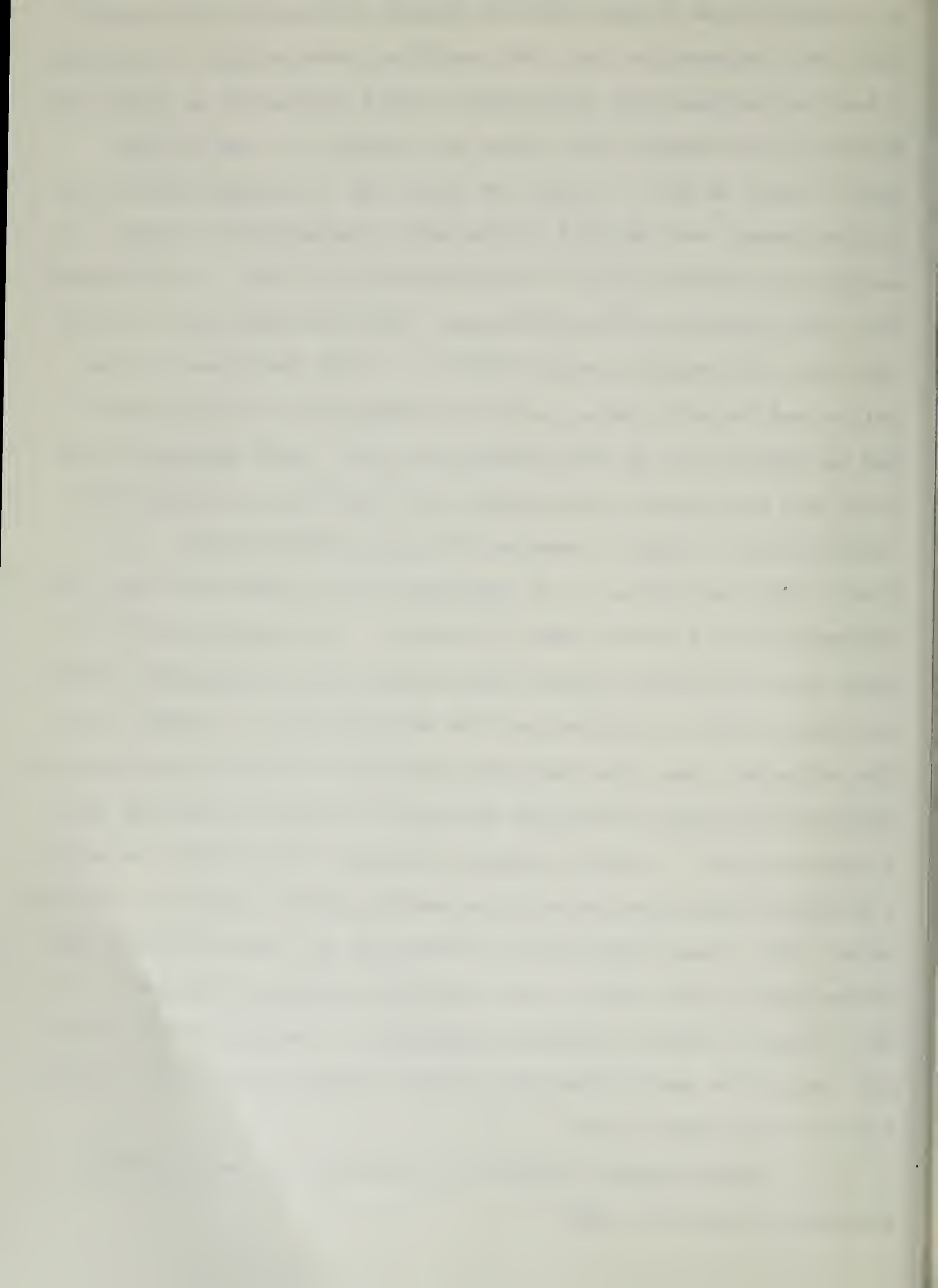
"Perovich's next contention that the verdict is not supported by the evidence is an afterthought. The verdict is supported by ample evidence. Perovich grossly overvalued the equipment he owned. Several of his employees testified that he did not own as much equipment as he claimed was stolen. Other evidence shows that Perovich's 'partner' owned some of the equipment and that it was not stolen."

Perovich v. Glens Falls Insurance Company
(9th Cir. 1968) 401 F.2d 145, 146-147

An example of an incredible piece of testimony by Mr. Perovich is contained in his deposition of December 2, 1966. (page 594, line 21 to page 603, line 8) When asked if he had any other complaints against defendants, Mr. Perovich complained of

an attack on his person which he thought defendants may possibly have been responsible for. He testified substantially as follows: I had just stepped out of the Pen & Quill Restaurant at Sixth and Flower in Los Angeles when three men jumped me. One of them said, "There he is." I gave the first one a straight karate jab to the throat, and he fell to his knee, clutching his throat. I snapped the kneecap of the second man with my foot. I dislocated the left shoulder of the third man. The three men were all over six feet, all weighed around 200 lbs. I had seen none of them before and haven't since, and it all happened so quickly that I had no opportunity to look closely at them. They appeared to me to be men who worked around steel, in foundries, or perhaps in construction. I don't remember if they carried weapons. I didn't call the police or an ambulance, just walked back into the restaurant for a double shot of Scotch. I was concerned that I might have seriously injured the man who was clutching his throat, but when I left the restaurant the men were gone. I didn't tell the bartender about the encounter, and don't know of any witnesses; someone should have heard the shouting. No one was with me when I was attacked. I didn't suffer a scratch, but my back, on which I'd had an operation two or three months earlier, gave me a little pain. All I heard them say was "There he is," and of course one fellow howled with pain -- the one whose kneecap I snapped. I don't know if anyone called an ambulance. I waited around, thinking the police would have been called because of the man's screaming but they didn't come.

Still another example is contained in the deposition of September 22 and 23, 1966:



"Q Now, you have testified that you still have three centrifugal lining machines plus possibly some scattered parts of a prototype. Where do you keep these three centrifugal lining machines that we have referred to?

"A Next to my 30-30 rifle.

"Q Where do you keep your 30-30 rifle?

"A Next to the machines, in my bedroom.

"Q The machines are in your bedroom?

"A Yes, they are, sir.

"Q All three of them?

"A All three of them.

* * * *

"Q Now, you have three machines in your bedroom, as I understand your testimony. How large are these machines? Can you describe the dimensions for us?

"A No.

"Q You have no idea of the dimensions of the machines?

"A Well, I don't know if they are all there or not. I was thinking about that just out here in the hall.

"MR. HALL: He was asking you what size they are, in terms of inches or feet.

"THE WITNESS: I know, but I haven't looked in there for some time. I don't recall.

"Q BY MR. COOPER: Your testimony is that you haven't looked in your bedroom for some time?

"A I have them in a closet in my bedroom.

"Q And all three of them fit into a closet?

"A What I have in there is fitting in there. It is in there.

"Q And there are three in there, you think?

"A Well, I think so. It may be. It may not be. I don't know. They are in --

"Q Could the machines be anywhere else?

"A Possibly.

"Q Where else could they be?

"A I don't know at this time.

"Q Where is your 30-30?

"A That is right next to my left hand, sir.

"Q You don't keep it in the closet?

"A It is in -- it is right in the closet.

"Q You are sure that is there?

"A Yes, sir. I check that periodically.

"Q And of course in checking that periodically you haven't observed how many machines you have got in the closet, though; is that correct?

"A I think there is something covered over them.

"Q What sort of something is it?

"A Oh, probably my bathrobe or something."

[Perovich Deposition 9/22-23/66, pp. 534-538]

It is, however, unnecessary to even explore the question of plaintiffs' ability to raise the amount due United prior to April 7 on the basis of their own assets or credit, for it is uncontroverted that plaintiffs received a check on the morning

of April 5, 1967 from defendants American and Pipe Linings, Inc. in an amount far in excess of the sum due United, an amount which United understands was approximately $10,000. Thus, on April 5, plaintiffs knew that they had or would have as soon as they cashed the check, more than enough money to reimburse United for its expenses. Furthermore, as of the hearing on April 6, when the settlement with Centriline was approved by Judge Pence, plaintiffs knew they had another sum forthcoming, which defendant United believes was an amount similar to the amount paid by American and Pipe Linings. These very points were made by United in its Memorandum filed April 28 and were not denied by plaintiffs. [C.T. 3943]

More direct evidence that there were funds on hand that could have been used to pay the sanctions is contained in two documents filed by Batris W. Perovich before the Court of Appeals, Ninth Circuit, in this very action. The first of these documents was a petition to the court to set aside its order allowing appellant's counsel to withdraw. An attached affidavit by Mr. Perovic stated that, "with respect to sanctions, on the date when said sanctions were due, April 7, 1967, there were ample funds belonging to appellant to pay such sanctions, and appellant urged his counsel to make said payment and meet the Court's demand." [pp. 4-5] In a further document entitled, "Appellant's Reply to Counsel's Opposition to Appellant's Original Petition; Motion and Affidavit" dated April 23, 1968, Perovich reaffirmed his position that funds were on hand which could have been used to pay the sanctions. In addition he included a letter on the letterhead of McKenna & Fitting written by W. Z. Jefferson Brown and dated April 5, 1967. This letter, addres to Mr. Davin, enclosed a check for $10,000 made payable to Inplace

Linings Incorporated, Northwest Pipe Linings, Batris W. Perovich and McKenna & Fitting jointly. That Mr. Perovich is telling the truth in this instance is demonstrated not only by the letter over the signature of Mr. Brown, but by Mr. Weinstein's statement on April 6 that his clients would probably accept his judgment as to whether or not sanctions should be paid. [R.T. 4/6/67, p. 52, lines 20-21]

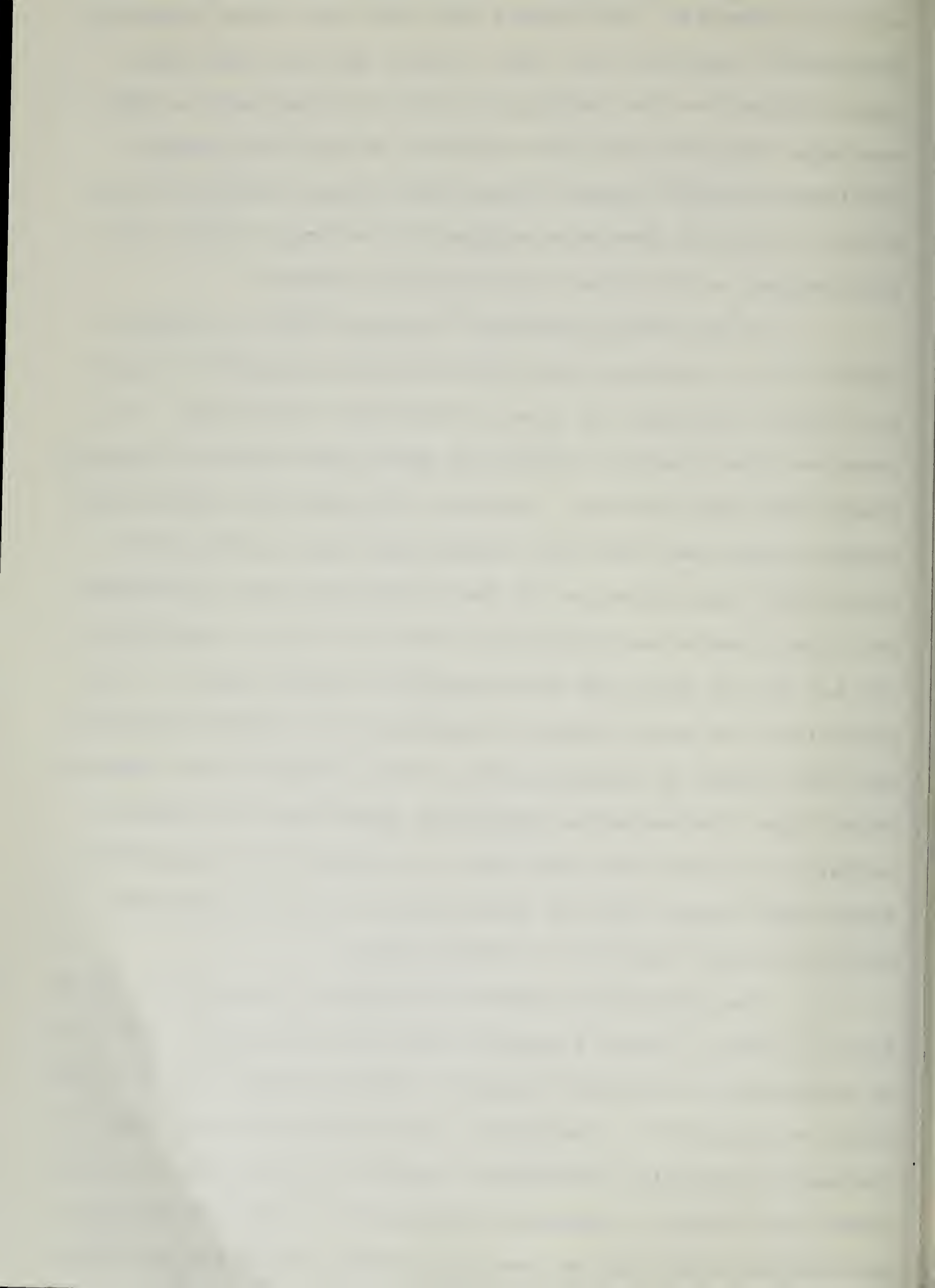
A document plaintiffs filed on April 25, 1967, inauspiciously entitled, Plaintiffs' Memorandum Re Payment of Sanctions and Filing of Trial Brief, contained a "modest" proposal. In that document, plaintiffs acknowledged that they then had the funds with which to pay the sanctions due United. Plaintiffs offered to pay them in the event the court would permit them to be paid, although the deadline of April 7 had long since passed. In that document plaintiffs linked their tardy tender of the sanctions with an extension of time in which to file the required trial brief until June 15, 1967 -- which would have been the sixth postponement of that date. Plaintiffs argued that the settlements and dismissals of the cases against all defendants except United, and the pending settlement between plaintiff Inplace Linings Incorporated and United had so reduced the burden of preparing the trial brief that plaintiffs could file the brief by June 15, 1967. [C.T. 3933-3938]

The difficulty with plaintiffs' reasoning was that if the dismissal of the cases against all defendants except United in fact would have reduced the plaintiffs' burden so considerably then why were United's expenses not paid on April 7 or promptly thereafter? Considerably prior to April 7, settlements with defendants Martin-Marietta and American Vitrified Products Company

had been affected. Settlements with the other three remaining defendants, American Pipe, Pipe Linings and Centriline were negotiated before the hearing on April 6 and approved at that hearing. Therefore with the exception of the then pending settlement between Inplace Linings and United, plaintiffs knew prior to the time they were supposed to reimburse United that their burden on the trial brief would be reduced.

In any event plaintiffs' current offer to reimburse United for its expenses was connected with plaintiffs' request for another extension of time to file their trial brief. Yet there was absolutely no showing of good cause why this extension should have been granted. Instead, the memorandum demonstrated further reason why the brief should have been filed April 27. Plaintiffs' memorandum on its face illustrated that plaintiffs felt their burden was reduced by reason of various settlements, all but one of which had been negotiated before April 6. Thus plaintiffs had known before the deadline for reimbursing United that the burden of preparing their trial brief had been reduced. Under those circumstances plaintiffs should have proceeded to prepare the trial brief and file it by April 27 as required by court order rather than to deliberately refuse to reimburse United and seek dismissal of their cases.

The prejudicial effect on United of plaintiffs' about face is clear. United's counsel had halted all work and progress on preparation of United's summary judgment motion and its trial brief as of April 7. Thereafter, substantial time was devoted instead to preparing defendants' motion to dismiss the Perovich cases for failure to reimburse United; and in that connection a substantial effort was devoted to a review of the law and facts



pertinent to the appeal plaintiffs claimed they would take from the court's dismissal. Then after time had been devoted to the above projects, which plaintiff deliberately invited, they sought to reverse direction again and undo their prior decision, to United's prejudice.

Plaintiffs' untimely tender of $656.15, tied as it was to an almost two-month extension in the date for filing plaintiffs' trial brief, was no more than a ploy to make their contumacious refusal to obey the Court's order regarding reimbursement of United Concrete "look better" on appeal. [C.T. 3945] In view of plaintiffs often repeated statements about seeking appellant review, it appears that their untimely offer to pay the sanctions -- late -- and to file the trial brief -- also late -- was merely an effort to make the trial court's dismissal of their action appear to be unreasonable.

On May 19, 1967 Judge Pence entered an order dismissing the Perovich cases with prejudice. Judge Pence had no reasonable alternative, in view of the plaintiffs' open refusal to pay sanctions when due and their failure to obey the court's order as to filing a trial brief. The court's Memorandum and Order of Dismissal followed on May 25, 1967. [C.T. 3954, 3957-3974]

V

ARGUMENT

A trial court judge has ample authority to dismiss a case when his orders are not obeyed. In the Perovich case two of Judge Pence's orders were deliberately disobeyed: The order to pay sanctions and the order to file a trial brief. In addition, there was a history of delay in the case, particularly in

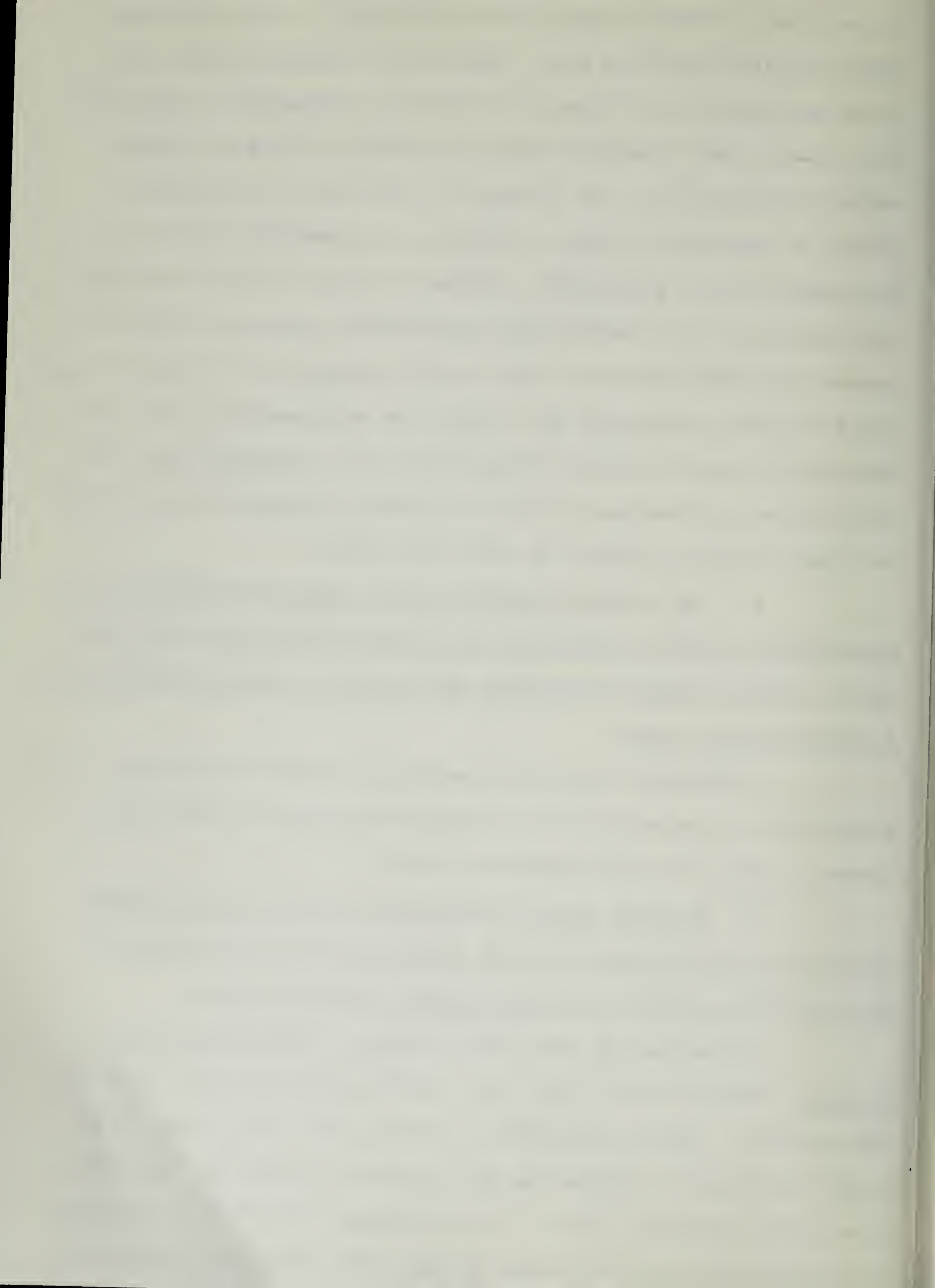
in relation to the filing of the trial brief -- for which six separate dates had been set. Plaintiffs' refusal to pay sanctions was not due to financial inability; plaintiffs refused to pay because they disagreed with the court's ruling on various motions irrelevant to the payment of sanctions, and wished to pursue an appellate remedy. Likewise, as plaintiff admits in his appeal brief, plaintiffs' refusal to file a trial brief by the deadline date resulted from plaintiffs' conscious choice to concentrate their efforts first on the preparation of various motions already considered and second, on settlement of the cases. Plaintiffs consciously put Judge Pence in a situation where the alternative to dismissal of the case was to reward the plaintiffs for their willful refusal to obey his orders.

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING A CASE IN WHICH THE PLAINTIFFS FAILED TO COMPLY WITH COURT ORDERS AWARDING SANCTIONS AND SETTING A DEADLINE FOR FILING A WRITTEN TRIAL BRIEF.

A federal court may dismiss an action for failure of the plaintiffs to prosecute or to comply with orders of the court. [Federal Rule of Civil Procedure 41(b)]

1. A Trial Court's Dismissal for Failure to Comply With Orders of the Court or for Failure to Prosecute Will be Reversed Only if the Court has Abused its Discretion.

Illustrating this rule is Link v. Wabash Railroad Company (1962) 370 U.S. 626, the leading Supreme Court case on the subject. There plaintiff's attorney did not attend a pretrial conference, because he was preparing papers to file with the Indiana Supreme Court. He so informed defendant's attorney and telephoned the courthouse to give them the same information.



"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted.

* * * *

"On this record we are unable to say that the District Court's dismissal of this action for failure to prosecute, as evidenced only partly by the failure of petitioner's counsel to appear at a duly scheduled pretrial conference, amounted to an abuse of discretion."

Link v. Wabash Railroad Company, 370 U.S. 626, 629, 633

Thus the Supreme Court recognized that the standard of appellate review is abuse of discretion.

The Ninth Circuit applied the abuse test in Russell v. Cunningham (9th Cir. 1956) 233 F.2d 806, stating that there will be no reversal on a dismissal for failure to prosecute in the absence of gross abuse of discretion.

"This court will not reverse the dismissal for lack of prosecution unless there has been a gross abuse of discretion. United States v. Pacific Fruit & Produce Co., 9 Cir., 1943, 138 F.2d 367."

Russell v. Cunningham (9th Cir. 1956), 233 F.2d 806, 808

See also Pearson v. Dennison (9th Cir. 1965) 353 F.2d 24 and Boling v. United States (9th Cir. 1956) 231 F.2d 926 (emphasizing the problem of crowded dockets).

Nor must prejudice be shown to justify dismissal. Pearson v. Dennison (9th Cir. 1965) 353 F.2d 24. Prejudice is

presumed from unreasonable delay. Hicks v. Bekins Moving and Storage Co. (9th Cir. 1940) 115 F.2d 406.

2. Dismissal Has Been Upheld on Appeal in Many Cases in Which Plaintiff's Conduct Has Been Similar to or, Indeed, Far Less Disruptive than that of Perovich.

There are a number of cases closely resembling the Perovich case in which the trial court has dismissed an action, and those dismissals have been uniformly upheld on appeal. Bearing a striking resemblance to the current Perovich action -- though involving general mortgage bonds, not antitrust allegations -- is Grunewald v. Missouri Pacific Railroad (8th Cir. 1964) 331 F.2d 983. In Grunewald the action was filed in February 1962. After the trial date was reset four times -- once over plaintiff's opposition, once on the court's own motion, and twice by agreement or leave and consent -- the case was dismissed in September 1963.

In February 1963 plaintiff's then attorney had withdrawn from the case. In June the plaintiff wrote the court a letter mentioning the death of a daughter, the burden on plaintiff's estate for the care of the daughter's three orphans, plaintiff's illness, plaintiff's inability to be ready for trial on July 8 and the illness of several necessary witnesses. Plaintiff asked for a ninety-day continuance. After an exchange of letters, a new attorney said, on July 5, that plaintiff had come to his office on the previous day. He said he would represent plaintiff if he could be given until August 8. The court then reset the case for September 4, giving plaintiff's new attorney more than the time he requested.

In a letter to the court dated August 31 plaintiff's new attorney withdrew from the case. On September 3 a third attorney telegraphed the court saying he would represent plaintiff if the case were continued. Thus the third attorney was in a position comparable to that of Mr. Weinstein in January 1967.

In Grunewald the trial court dismissed and the Court of Appeals affirmed. After stating that a federal court may dismiss a case for want of prosecution, and that such dismissal is a matter of discretion, not reversible in the absence of abuse, the court stated the applicable principle:

> "It is equally well settled, and plaintiff's counsel in his brief concedes, that in a civil case an attorney's withdrawal does not give his client an absolute right to a continuance. This, too, is a matter for the court's discretion. * * * Here again, a trial court's refusal to grant a continuance will not be disturbed on appeal unless abuse of discretion is demonstrated."

Grunewald v. Missouri Pacific Railroad
(8th Cir. 1964) 331 F.2d 983, 985-986

The court summarized plaintiff's arguments but failed to find abuse of discretion.

> "We turn back to the facts and the chronology of this case. One, of course, can say, as the plaintiff does, that she has not had her day in court; that, while there were no less than four continuances, at lease the docket entries indicate that these were not made upon her sole request or granted over opposition; that the plaintiff has had misfortune in her family;

"that her last and non-local attorney withdrew on the eve of trial and without leave of court; and that she and her new counsel should not be penalized for all this.

"The standard we must apply, however, as indicated above, is not what we as individual judges might have done under the circumstances, but whether the district court's action was an abuse of its discretion. We cannot so conclude."

Grunewald v. Missouri Pacific Railroad
(8th Cir. 1964) 331 F.2d 983, 986-987

The court pointed out that the case had been at issue for seventeen months and said that the mere fact of withdrawal of counsel, unexplained, does not necessarily justify a continuance. This is because under a contrary rule a party could successfully obtain a continuance by discharging his counsel or inducing him to file a Notice of Withdrawal.

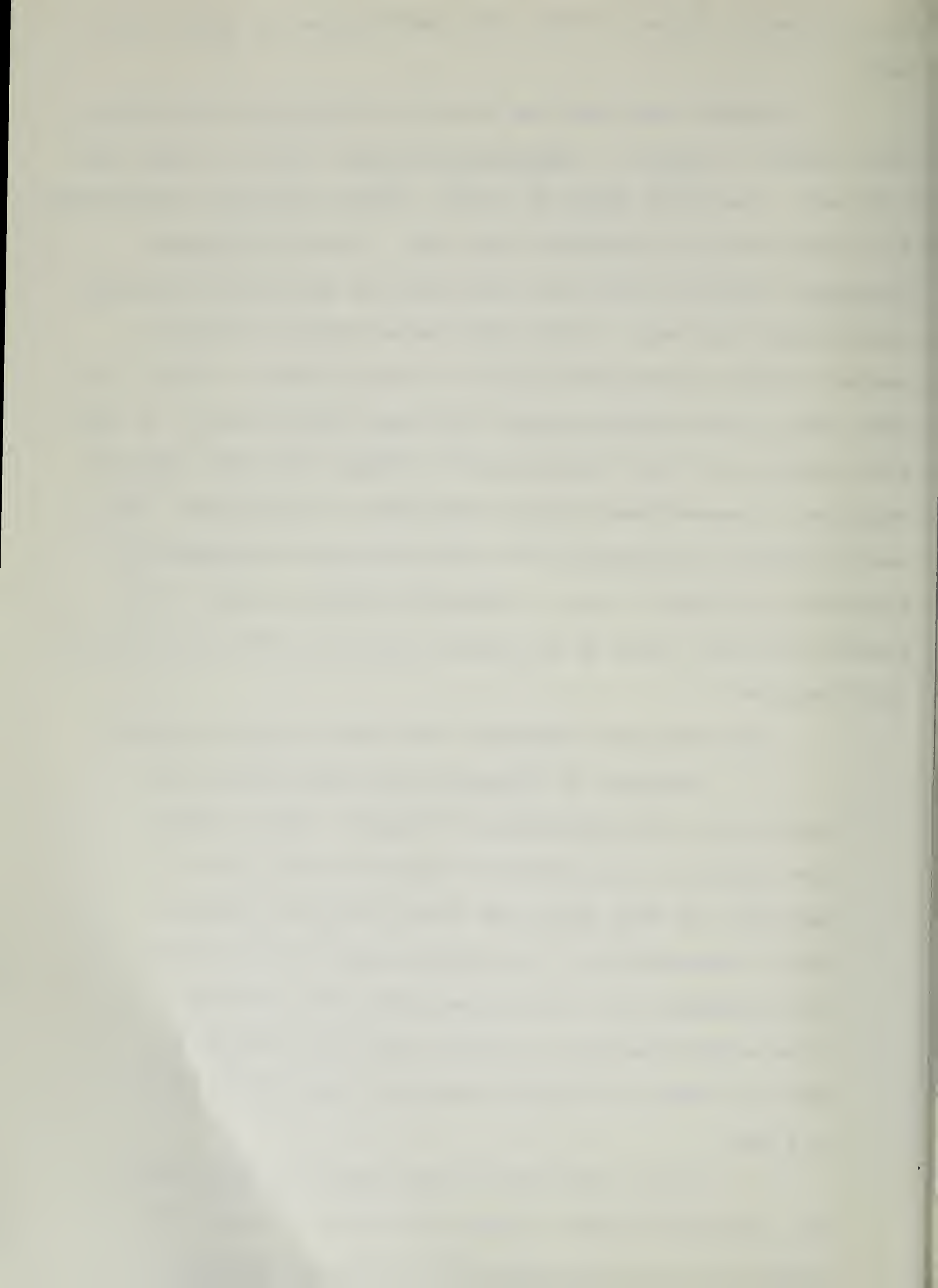
The parallels between Grunewald and Perovich are very strong. Most of the differences which do exist make Perovich the stronger case for dismissal. In Grunewald, for example, the dismissal came as the third counsel was just entering the case. Here, the third counsel was himself given several months in which to prepare a trial brief. Here also, we do not have merely the unexplained withdrawal of counsel -- we have the plaintiff's dismissal of counsel. In addition Grunewald involved much less elapsed time, and the continuances granted there were never at plaintiff's sole request; indeed, one extension in Grunewald was granted over plaintiff's objections. Here, the five extensions of time for filing plaintiffs' trial brief were all granted at

his attorney's request, after they had demanded an early trial date.

Another case bearing strong resemblances to the Perovich action is Refior v. Lansing Drop Forge (6th Cir. 1942) 124 F.2d 440. Plaintiff filed an action against majority stockholders in a corporation on September 10, 1935. When his original attorneys objected that their fees had not been paid, plaintiff substituted attorneys. After many maneuverings, during the course of which plaintiff failed to show up before a master, the case came on for hearing almost six years after filing. At that point appellant's new local counsel withdrew from the case and appellant's nonresident counsel moved for a continuance. The court ordered a continuance for one week upon the payment by plaintiffs of $100 in costs. Plaintiff refused to pay, or to proceed with the trial of the cause within one week, so the case was dismissed.

Upholding the dismissal the Court of Appeals stated:

> "Parties to litigation are entitled to its prosecution with reasonable diligence. Where prejudice results to one party by failure on the part of the party on whom rests the burden of going forward with a cause within a reasonable time to bring about its determination, the injured party has the right to move for dismissal. Actual injury may either be shown or inferred from the lapse of time if the lapse be great.
>
> "Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has the power



to apply the penalty of dismissal.

Refior v. Lansing Drop Forge (6th Cir.1942) 124 F.2d 440

One of the aggravating features of Perovich's blatant refusal to obey the trial court's orders is that the refusal came only after the court denied several motions made by plaintiffs. Dissatisfaction with the results led plaintiff to decline to resume work on the case. Two cases have affirmed dismissals in remarkably similar circumstances. In Hooper v. Chrysler Motors Corporation (5th Cir.1963) 325 F.2d 321, cert denied 377 U.S. 967, a dismissal with prejudice was upheld after the plaintiff declined to go to trial after denial of his motion for a continuance. Similarly, in Blue Mountain Construction Company v. Werner (9th Cir.1959) 270 F.2d 305, cert denied 361 U.S. 931, dismissal was upheld when plaintiff declined to proceed further after losing his motion to dismiss without prejudice. The appellate court therefore held that a dismissal with prejudice for lack of prosecution was justified. (In addition, plaintiff had not shown up at a pretrial conference set by the court, but dismissal was upheld even absent plaintiff's "positive defiance" of the order of the court "setting the pretrial conference.")

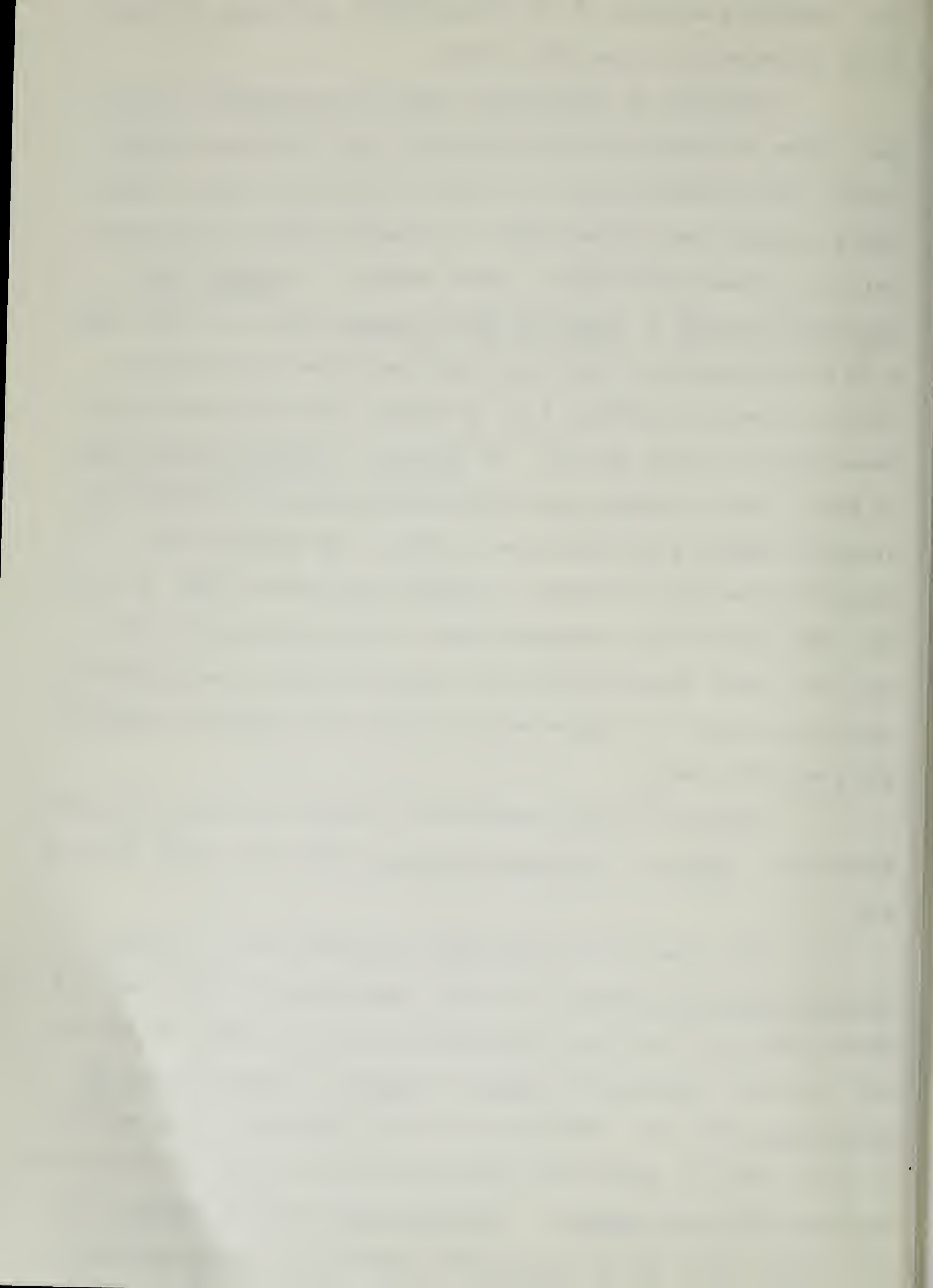
Another aggravating factor justifying dismissal of the Perovich case was that plaintiff's refusal to pay sanctions and to proceed with the trial brief was made deliberately. In O'Brien v. Sinatra (9th Cir. 1963) 315 F.2d 637, upholding a dismissal under Rule 41, one of the major factors influencing the court was that plaintiff's failure to amend as ordered by the court was not inadvertent, but deliberate. That plaintiff's refusal here was deliberate is evidenced by their statements in court on April 6, their Notice of Refusal to Pay Sanctions of April 11,

1967 and the statement of the alternatives available to plaintiffs in Perovich's appellant brief.

Contrary to plaintiffs' apparent assumption, courts have shown no hesitation in dismissing civil antitrust damage cases, and certainly have not treated antitrust cases as something sepcial, less susceptible to dismissal when a plaintiff fails to prosecute or defies court orders. In Sandee Manufacturing Company v. Rohm and Haas Company (7th Cir. 1962) 298 F.2d 41, an antitrust case was dismissed when the plaintiff failed to begin pretrial, i.e. to present the documentary evidence that he would rely on. In Becker v. Safelite Glass Corp. (D.Kans. 1965) dismissal was ordered when plaintiff failed to properly expedite his antitrust action. The Handbook for Effective Pretrial Procedure, Judicial Conference 1964, 37 F.R.D. 255, 268 specifically suggests that in the protracted or big case the court should tighten its control of the case; obviously control can only be tightened if a court acts swiftly to enforce its pretrial orders.

Failure to pay sanctions has itself been held to justify dismissal. Refior v. Lansing Drop Forge (6th Cir. 1942) 124 F.2d 440.

For other cases upholding dismissals see: Levine v. Colgate-Palmolive Company (2nd Cir. 1960) 283 F.2d 532, cert denied 365 U.S. 821 (not appearing for trial at the time set at the pretrial conference); Wirtz v. Hooper v. Hommes Bureau Incorporated (5th Cir. 1964) 327 F.2d 939 (failure to comply with a court order to supply the other party with a list of witnesses); Package Machinery Company v. Hayssen Manufacturing Company (7th Cir. 1959) 266 F.2d 56 (plaintiff's refusal to supply defendants



with a more specific statement of certain trade secrets); Sleek v. J. C. Penney Company (W.D.Pa. 1960) 26 F.R.D. 209 (failure of plaintiff to comply with a local pretrial order as to filing a pretrial statement, despite notices); Fitzsimmons v. Gilpin (9th Cir. 1966) 368 F.2d 561 (taking no proceedings other than filing suit); Janousek v. Wells (8th Cir. 1962) 303 F.2d 118 (cluttering up the proceedings with numerous motions, while not giving approval to have the case tried soon); and Wisdom v. Texas Company (N.D.Ala. 1939) 27 F.Supp. 992 (nonappearance at pretrial conference).

It certainly seems fair to generalize from the foregoing cases that failure to comply with a court order or failure to perform a step necessary to the continuation of the case will furnish ample grounds to justify the trial court in exercising its discretion to dismiss the action.

The status of the Perovich case in the spring of 1966 can be aptly compared with the condition of Russell v. Cunningham (9th Cir. 1956) 233 F.2d 806 in August of 1955. The court, after describing how the case had been at issue for fifteen months, summarized the situation as follows:

> "Here, all the record shows is a long delay, two continuances, and no sign that appellant was any nearer to trial in August of 1955 than he was in April of that year or in June of the previous year at the time of the pre-trial order. While the case involves nowhere near the abuses found in the typical situation where F.R.C.P. 41(b) is invoked, it cannot be said that the District Court abused its discretion without resorting to contentions of fact not found in the

"record."

Russell v. Cunningham (9th Cir. 1956)

233 F.2d 806, 811

The court's language can as well be applied to the Perovich case. To paraphrase: "All the record shows is a long delay, several continuances, and no sign that appellant was any nearer to a pretrial memorandum in April of 1967 than he was in December 1966 or for sometime previously."

3. No Case in Which an Abuse of Discretion in Dismissing Has Been Found Bears any Important Resemblance to the Perovich Case.

Cases in which abuse of discretion in dismissing has been found bear virtually no resemblance to the Perovich case. The cases on which appellant leans most heavily generally involve inadvertence, a much smaller lapse of time than in the Perovich case, or other mitigating features not to be found in the Perovich case. A clerk's failure to issue a summons, a four-month-old case dismissed, a new plaintiff, a clerk's assurance to an attorney, are examples. They simply do not come to grips with the issue here presented as illustrated by the following short summary of the cases cited by plaintiff.

In Jefferson v. Stockholders Publishing Company (9th Cir. 1952) 194 F.2d 281, the clerk failed to issue summons forthwith. The appellate court held that therefore the district court was not deprived of jurisdiction to hear the case and that dismissal was not warranted.

In Meeker v. Rizley (10th Cir. 1963) 324 F.2d 269, the court held that the default judgment for the defendants must be set aside since no three-day notice had been given to the

plaintiff as required by Rule 55(b)(2). Treating the district court's action as a dismissal under Rule 41(b) the appellate court held that the dismissal of a four-month-old case where plaintiff failed to attend a hearing was not justified.

In Stanley v. Alcock (5th Cir. 1962) 310 F.2d 17 a trustee in bankruptcy was plaintiff. The appellate court held that a motion for summary judgment for the defendant should not have been granted. In addition, the court held as to dismissal that the plaintiff's attorney was not in default in not attending hearings on a motion when his client had died before the date of the hearing, since a new trustee gets a reasonable amount of time to acquaint himself with the issues of the case. As to lack of prosecution, the court found extenuating circumstances not present in Perovich. The case did not present facts similar to most of those in which dismissal has been upheld; and the dismissal by the trial court appears to have been a make-weight to support the broader basis of a summary judgment granted for lack of triable issues of fact. (It is interesting that plaintiff generalizes this case into "the need for new personnel to familiarize themselves with the issues." [Appellant's Brief, p. 40, lines 2-3] Of course the case was not concerned with a change of attorneys but with a change of plaintiffs.)

In Red Warrior Coal & Mining Company v. Baron (3rd Cir. 1952) 194 F.2d 578, the case was dismissed after the clerk assured the attorney that it would be put over for a week, and the attorney relied by allowing a witness to stay in Los Angeles.

In Davis v. Operation Amigo Incorporated (10th Cir. 1967) 378 F.2d 101, the case was filed on December 10, 1965. It was at issue on February 3, 1966, and trial was set for

March 29. On March 28 plaintiff's attorney said his client had pneumonia. Here the court held that dismissal was too harsh and emphasized the brief time involved so far in the litigation.

In _Bon Air Hotel Incorporated_ v. _Time Incorporated_ (5th Cir. 1957) 376 F.2d 118, the court held that there could be no dismissal under Rule 37 relating to discovery, where the non-production of a witness was not the fault of the plaintiff, who did his best to secure the witness' attendance.

Independent Productions Corporation v. _Loew's Incorporated_ (2nd Cir. 1960) 283 F.2d 730 held that there could be no abrupt dismissal when the specific procedure of Rule 37 applies.

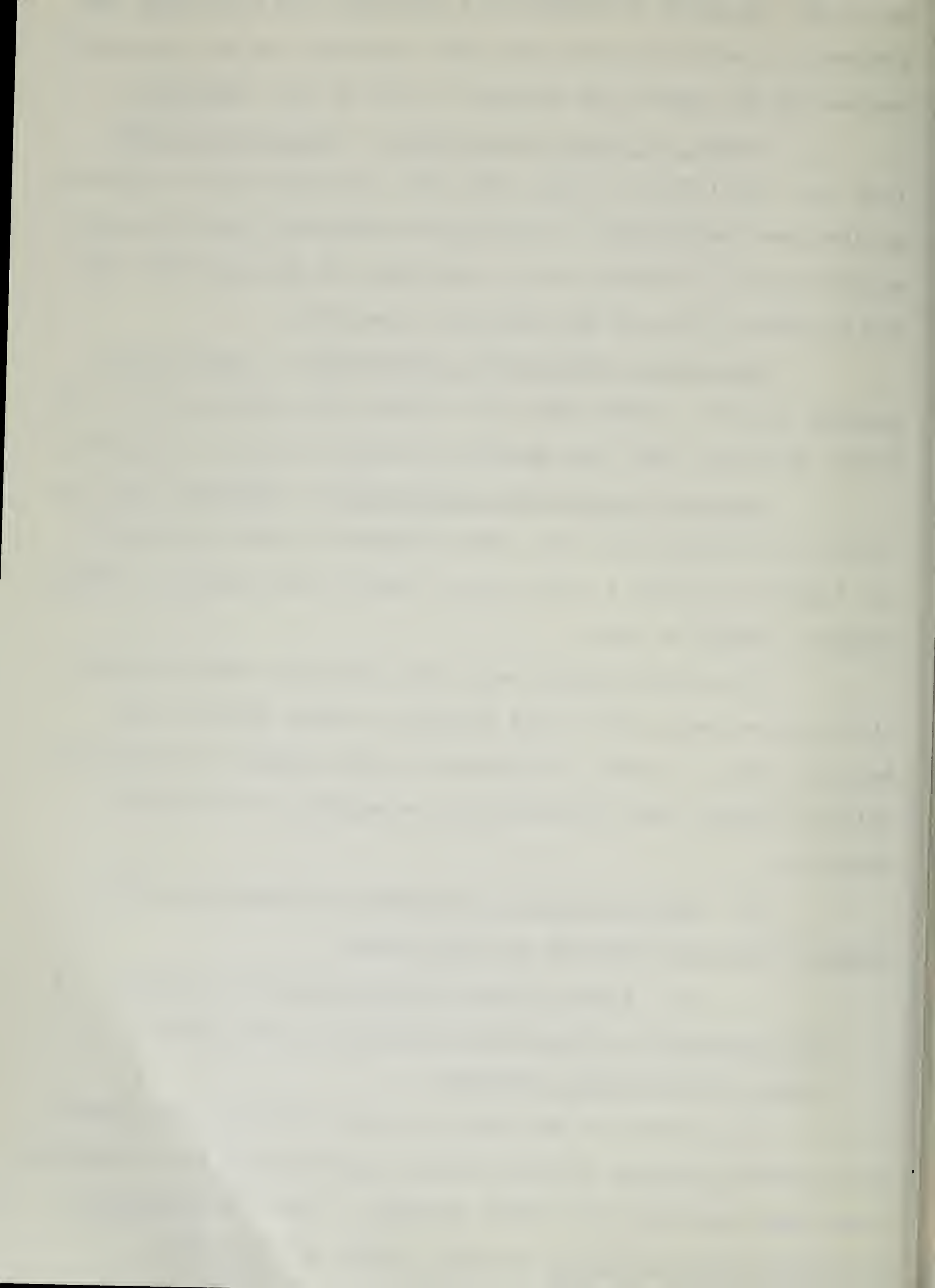
Syracuse Broadcasting Corporation v. _Newhouse_ (2nd Cir. 1959) 271 F.2d 910 held that Rule 16 gives no power to dismiss for failure to state a claim, etc., and for such purposes summary judgment should be used.

It can be readily seen that the cases cited by plaintiff involve facts not at all similar to those found in the Perovich case. In fact, dismissal has been upheld in cases involving conduct less dilatory and contemptuous than that of Perovich.

4. _Factors Urged by Plaintiff in Mitigation of His Conduct Have Been Rejected in Other Cases_.

a. _A new attorney is not entitled to enter the case with a clean slate, contrary to the implications of plaintiff's argument_.

In several of the cases in which dismissal was upheld new attorneys brought into an action received much less consideration than did Perovich's third attorney. Thus, in _Grunewald_ v. _Missouri Pacific Railroad_ (8th Cir. 1964) 331 F.2d 983,



plaintiff's third attorney told the court that he would represent plaintiff if the case would be continued. No continuance was granted, so he had no client. The appellate court pointed out that dismissal of the matter was within the court's discretion. The court said that granting a continuance to new counsel is also a matter of discretion.

> "It is equally well settled, and plaintiff's counsel in his brief concedes, that in a civil case an attorney's withdrawal does not give his client an absolute right to a continuance. This, too, is a matter for the court's discretion. * * * Here again, a trial court's refusal to grant a continuance will not be disturbed on appeal unless abuse of discretion is demonstrated."

Grunewald v. Missouri Pacific Railroad
(8th Cir. 1964), 331 F.2d 983, 985-986

An annotation at 48 A.L.R. 2d 1155, discussing the withdrawal or discharge of counsel in civil cases as ground for continuance, was quoted in the Grunewald case:

> "It is of interest in this connection to note that the cases in which the refusal of continuance was held justified outnumber, by a ratio of three to one, the cases in which the refusal of continuances was held arbitrary -- a clear indication of the fact that the exercise of discretion by the trial court will be disturbed only in extreme cases in which it clearly appears that the moving party was free of negligence."

48 A.L.R. 2d 1155, 1159, quoted at 331 F.2d 986

Even more telling for the Perovich case is the A.L.R. language which immediately follows:

> "There is not a single case involving the discharge of an attorney in which it was held that a continuance should have been granted for this reason, the taking by the party of an affirmative step causing lack of representation at the trial apparently being considered negligence or lack of diligence."
>
> 48 A.L.R. 2d 1155, 1159

In Refior v. Lansing Drop Forge (6th Cir. 1964) 124 F.2d 440 plaintiff's second local counsel withdrew from the case when it came on for hearing. At this point the court ordered a continuance for one week -- not the seventy-six days obtained by Mr. Weinstein -- upon the payment by plaintiffs of $100 in costs. When plaintiff refused to pay, or proceed with the trial within one week, the case was dismissed. Yet the appellate court upheld the dismissal, stating as follows:

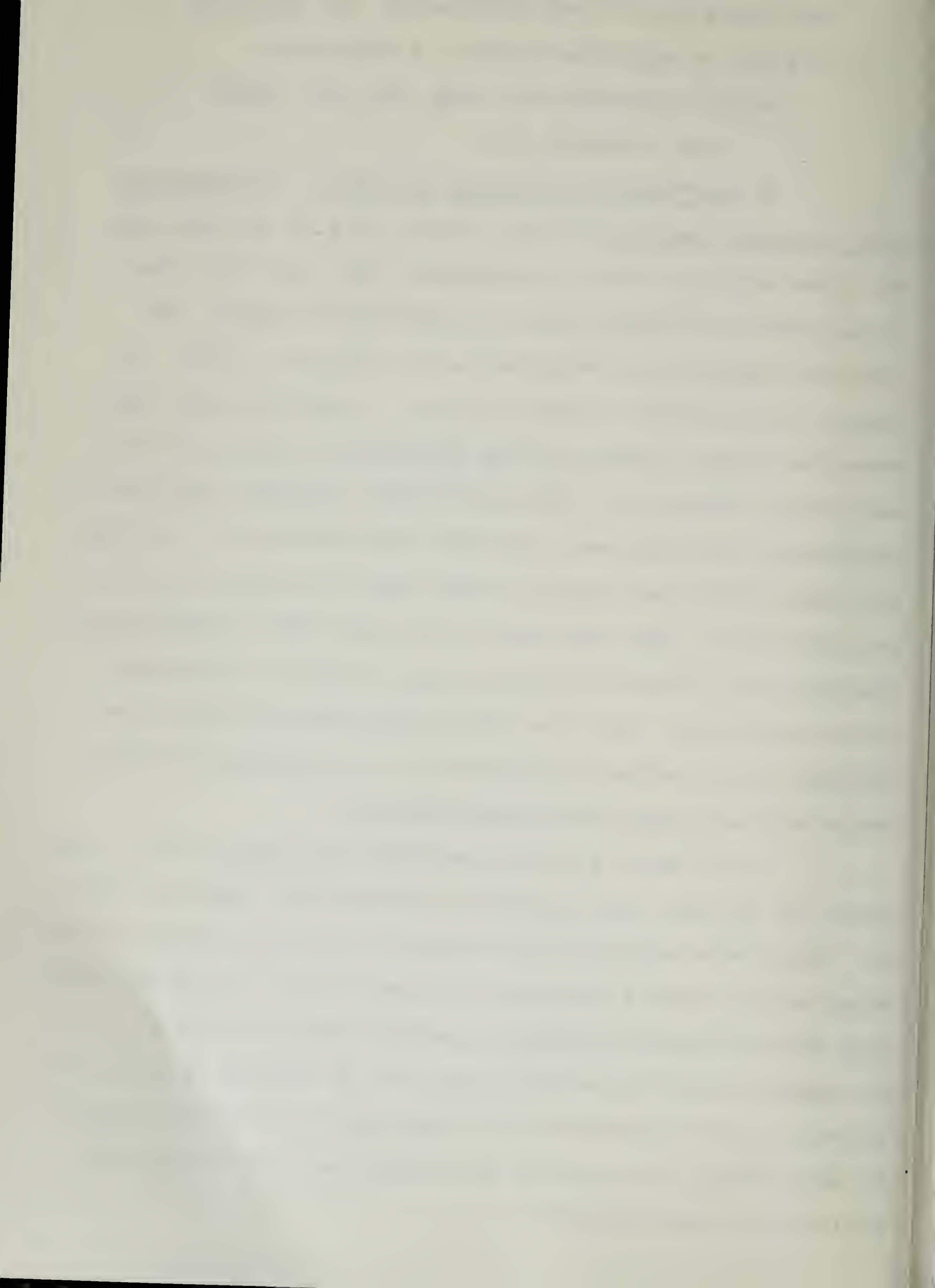
> "Parties to litigation are entitled to its prosecution with reasonable diligence. Where prejudice results to one party by failure on the part of the party on whom rests the burden of going forward with a cause within a reasonable time to bring about its determination, the injured party has the right to move for dismissal. Actual injury may either be shown or inferred from the lapse of time if the lapse be great.
>
> "Every litigant has the duty to comply with the reasonable orders of the court and, if

"such compliance is not forthcoming, the court has the power to apply the penalty of dismissal."

Refoir v.Lansing Drop Forge (6th Cir. 1942)
124 F.2d 440, 444

In Deep South Oil Company of Texas v. Metropolitan Life Insurance Company (2nd Cir. 1962) 310 F.2d 933, the case was filed in August 1957. In November 1961, after the case already had been delayed twice at plaintiff's request, the plaintiff had the case adjourned until February 1, 1962. On January 8, plaintiff's counsel retired. Thereafter the judge wrote the former counsel to urge plaintiff to hurry, as trial was set for February 1. When plaintiff's president requested an adjournment, the case was adjourned until February 5. At this time plaintiff's new attorney asked that the case be put over until the fall. The court would have given them a few days but dismissed when counsel was unwilling to take the case under those conditions. This case illustrates the rule that a new attorney is not automatically entitled to a continuance where there have been past continuances granted.

It is worth pointing out that Deep South is not a case where the attorney was discharged by plaintiff, which Perovich is. Thus there was even less reason in Perovich to allow lengthy delay merely because plaintiff had new counsel. It is not necessary that new counsel (given a generous amount of time in which to complete remaining work on the case) be allowed to reopen old matters already decided by the trial court or by former counsel. To allow delay to be grafted onto delay can only increase the prejudice to the defendants.



b. That plaintiff's attorney was not prepared within the proper time is no excuse.

A party who might have been prepared may not obtain a continuance merely because he is not prepared. In United States v. Pacific Fruit and Produce Company (9th Cir. 1943) 138 F.2d 367 the court stated that lack of preparation is no grounds for continuance unless there is a valid reason.

Similarly, Link v. Wabash Railroad Company (1962) 370 U.S. 626, the leading Supreme Court case on this subject, involved the failure of an attorney to attend a pretrial conference because he was doing other work. The Seventh Circuit in that case (291 F.2d 542) stated that preparing out of court work in another case with knowledge of the date set for the pretrial conference falls far short of being a legitimate excuse. To draw a fairly reasonable parallel, preparing a rehash of motions already heard by the trial court judge with full knowledge that a trial brief will soon be due, should not excuse the noncompletion of the brief.

c. Efforts to settle an action do not constitute compliance with court orders to prepare a brief.

In Appellant's Opening Brief plaintiff makes much of counsel's efforts to settle the action instead of writing the trial brief. (p. 49) Plaintiff states that "hence, while he was not working directly on the trial brief, he was working toward resolution of the cases." [Appellant's Brief, p. 49, lines 15-17] But efforts to settle the action are not "proceedings" as to lack of prosecution. Federal Deposit Insurance Corporation v. Lotsch (E.D.N.Y. 1944) 3 F.R.D. 464. This rather obvious proposition becomes worth noting only because plaintiff seems to consider his

efforts to settle the case as being some kind of compliance with the requirement for a pretrial memorandum.

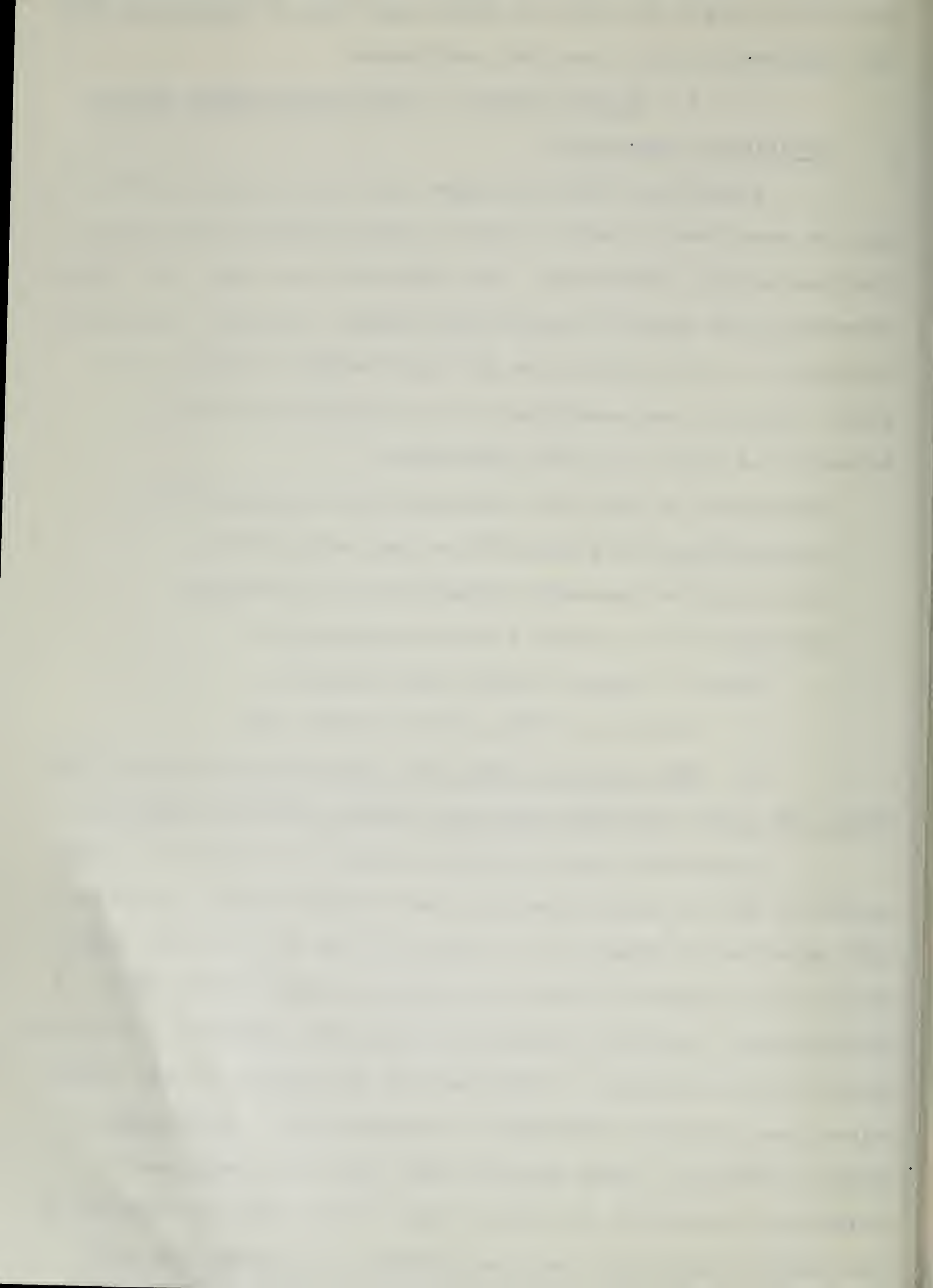
d. Delayed offers to obey court orders do not constitute compliance.

Similarly, plaintiff makes much of his belated offer to pay the sanctions -- and to write a trial brief if only given a sixth extension. Naturally, this offer did not come until after defendants had moved to dismiss the action. But such subsequent diligence -- and in this case it could hardly be called "diligence" since it was conditioned on yet another substantial extension of time -- is not sufficient.

> "Moreover, an order of dismissal may be granted notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence."
>
> Hicks v. Bekins Moving and Storage Co. (9th Cir. 1940), 115 F.2d 406, 409

B. THE DISTRICT COURT MAY IMPOSE SANCTIONS FOR AN ACT WHICH THE COURT CONCLUDES DOES NOT WARRANT OUTRIGHT DISMISSAL.

Plaintiff seems to believe that it is error to impose sanctions for an action that does not itself warrant dismissal. (Cf. Appellant's Brief, p. 3, lines 5-8 and p. 57) It is significant that plaintiff failed to cite any authority for this proposition. In fact, as might be logically expected, the law is precisely the opposite. Sanctions may be imposed in just those situations in which dismissal is inappropriate. In Matheny v. Porter (10th Cir. 1946) 158 F.2d 478, the court penalized defendant for failure to comply with a trial order by denying it the right to introduce certain evidence. The appellate court



agreed that the court had power to discipline defendants for noncompliance with their pretrial order and said that this was subject to a reasonable discretion. In this case the court's response seemed drastic, said the appellate court, but the trial court might well have imposed the costs incurred.

> " * * * The court had power to discipline the defendant for failing to comply with the pretrial conference order. And in the exercise of that power, the court was clothed with reasonable discretion in determining what measure of discipline was appropriate and should be imposed. The court might well have required the defendant to pay all costs incurred in connection with the presence of the witnesses in court, might well have taxed against defendant all costs incurred up to that time, or might well have imposed some other reasonable exaction. The withdrawal from defendant of the right to introduce any evidence in his own behalf bearing upon the issues of fact in the case seems drastic." [Emphasis added]
>
> Matheny v. Porter (10th Cir. 1946)
> 158 F.2d 478, 480

See also: Meeker v. Rizley (10th Cir. 1963) 324 F.2d 269, citing Matheny.

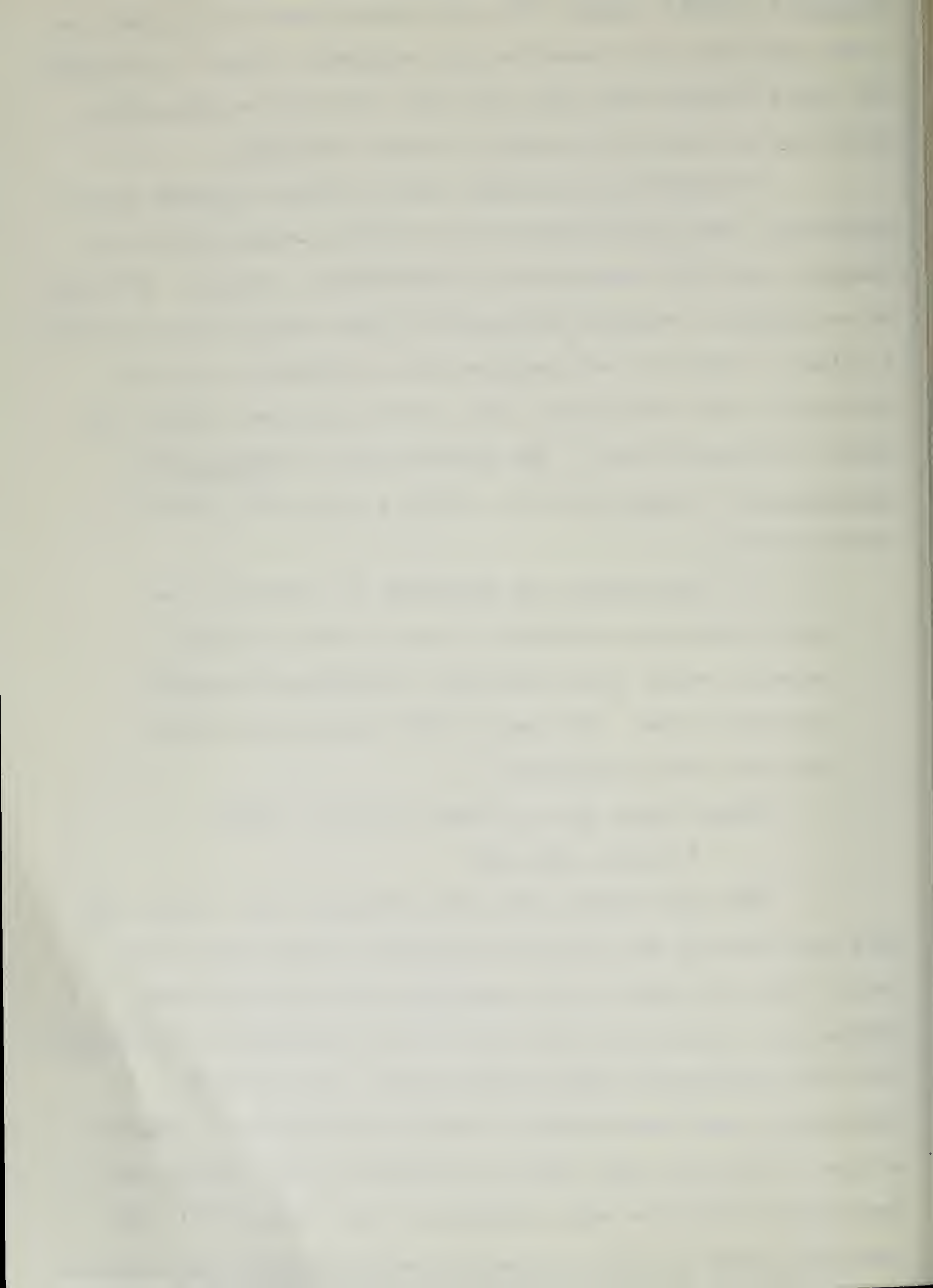
In Gamble v. Pope Talbot& Incorporated (E.D.Pa. 1961) 191 F.Supp. 763, modified (3rd Cir. 1962) 307 F.2d 729, cert denied 371 U.S. 888, the court held that a proper remedy for the defendant's delay, caused by oversight of counsel, was the imposition of costs regarding witness and counsel fees. Citing

Matheny v. Porter, supra, the court asked plaintiff to submit an order imposing costs caused by the defendant's delay. (On appeal the Third Circuit held that the trial court did not have the authority to impose the penalty upon the attorney.)

Plaintiff also asserts, again without citation of any authority, that the sanctions were unlawful because they were based on unverified statements of defendants' counsel. Attorneys do not submit a verified affidavit of their charges when charging a client. Courts do not require such an affidavit, in those actions in which attorneys' fees may be recovered; rather they award "reasonable fees." The approach used in Munson Line Incorporated v. Green (S.D.N.Y. 1947) 6 F.R.D. 470, 475 is characteristic.

> " * * * Accordingly the plaintiff is entitled to an order directing defendants to pay it the reasonable expenses which it has incurred, including reasonable attorney's fees. The sum of $250 seems to me reasonable and will be allowed."
>
> Munson Line, Inc. v. Green (S.D.N.Y. 1947)
> 6 F.R.D. 470, 475

The court simply sets the attorneys fees. Since the fees are whatever the attorney reasonably charges his client (or as the case might be his opponent) the idea that these charges are a matter of cold facts to be determined by affidavits for cross-examination makes little sense. In any event, defendants submitted detailed, itemized statements in support of their attorneys fees, which set forth the time spent each day and described the work performed. [C.T. 3602-3627] The important point is that the fees represented additional expenses



incurred by the defendants as a result of Perovich's discharge of his second counsel.

Plaintiff irrelevantly (p. 58, note 4) finds "shocking" Judge Pence's assessment of sanctions against Inplace Linings Incorporated. (That action has been settled and is not the subject of an appeal.) Inplace Linings Incorporated went along with Perovich's action in discharging Hall as Inplace had done in all other aspects of the litigation. Throughout the proceedings Inplace was essentially a free-rider. Perovich and his Northwest corporate entity paid their attorney fees on an hourly basis, while Mr. Hall handled the action on behalf of Inplace on a contingent fee basis. (R.T. 1/17/67, p. 96, line 20 to p. 98, line 8).

C. A PLAINTIFF MAY NOT REFUSE TO OBEY ORDERS OF THE COURT AS TO THE PAYMENT OF SANCTIONS AND THE FILING OF A TRIAL BRIEF IN ORDER TO GAIN QUICK REVIEW OF COLLATERAL MOTIONS NOT NORMALLY SUBJECT TO INTERLOCUTORY APPEAL, UNLESS THE COURT'S GROUNDS FOR DISMISSAL ARE THEMSELVES INVALID.

Unless the plaintiff can show that the lower court abused its discretion in (1) ordering payment of sanctions and (2) failing to give more time for the pretrial brief, the plaintiff must lose his case. Plaintiff must show both of these points since the dismissal was made for both reasons. If the trial court was correct on either or both of these points, there should be no reversal even if the trial court erred, as alleged, in ruling on any of the collateral motions.

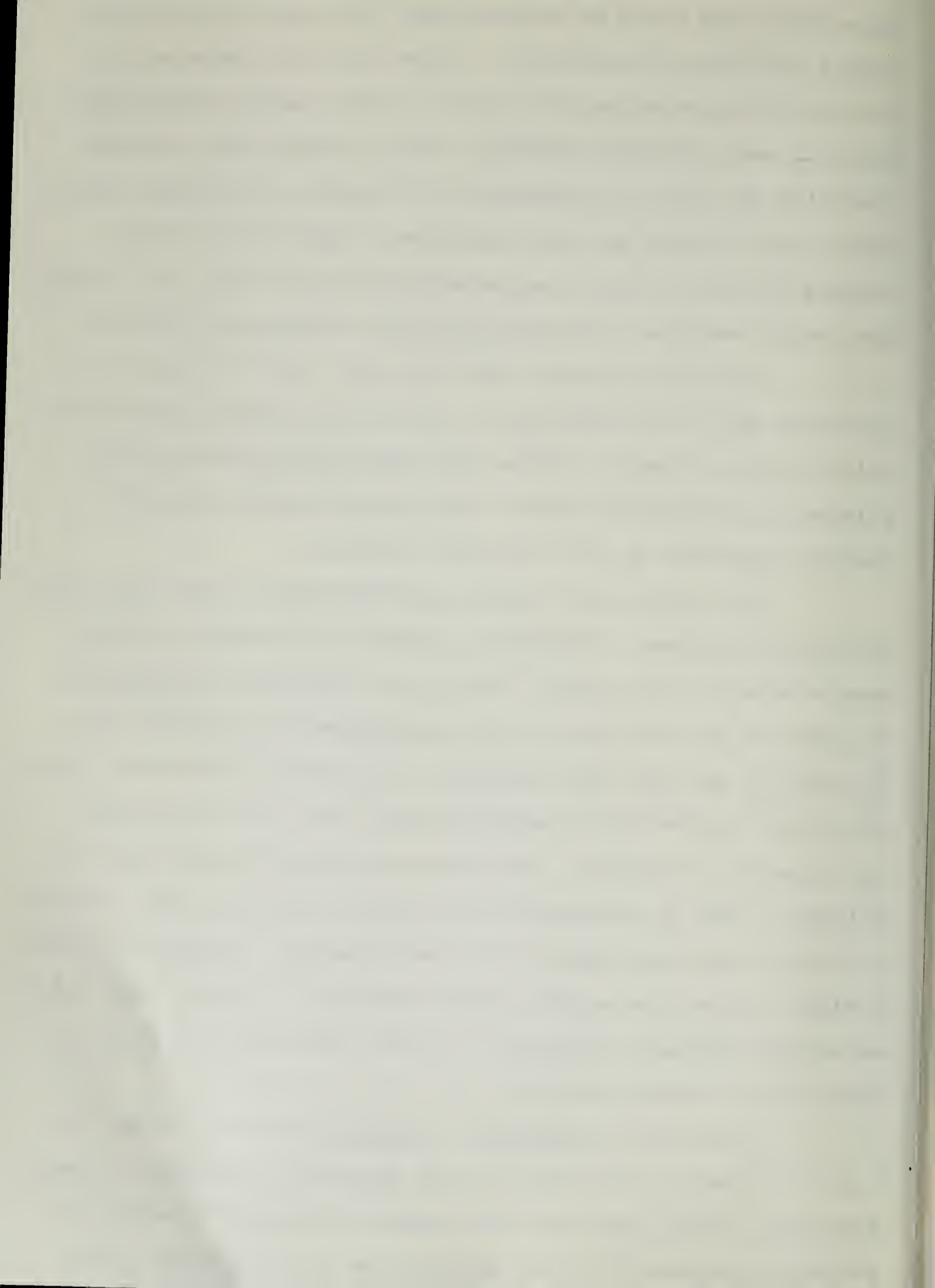
Allied Air Freight Incorporated v. Pan American World Airways Incorporated (2nd Cir. 1968) 393 F.2d 441 does not hold to the contrary. The court there simply held that a non-

appealable stay would be reviewed when the case was later dismissed for lack of prosecution. There the stay prevented the plaintiff from pursuing his district court remedies without exhausting administrative remedies. Under another order, however, plaintiff was under an obligation to commence proceedings within ninety days or have his case dismissed. Under those circumstances the stay, which coupled with the ninety-day order to keep him out of court, was reviewable upon the subsequent dismissal.

If it be conceded that the trial court's orders as to sanctions and as to dismissal for lack of prosecution were themselves proper, then to reverse the case because of the errors alleged in plaintiff's fourth issue, would put the stamp of judicial approval on the following situation:

The trial court issues a nonappealable order with which plaintiff disagrees. Therefore, plaintiff proceeds to violate some otherwise valid order, such as one relating to the payment of costs or one relating to the preparation of a pretrial memo, in order to get the case dismissed. The case is dismissed, since the court's authority is being flouted, and, it is determined the dismissal is proper. Nevertheless plaintiff could argue as follows: "Had it not been for the first erroneous order, I would not have defied the court in the later matter. Therefore, I have a right to have the earlier matter reviewed." Such a right would encourage wholesale disregard of court orders by litigants unhappy with pretrial rulings.

The case of Siebrand v. Gossnell (9th Cir. 1956) 234 F.2d 81, cited by appellant, is not opposed to this view. There defendant Carroll appealed from an order denying his motion to satisfy a judgment for $100 against him, but he did not appeal



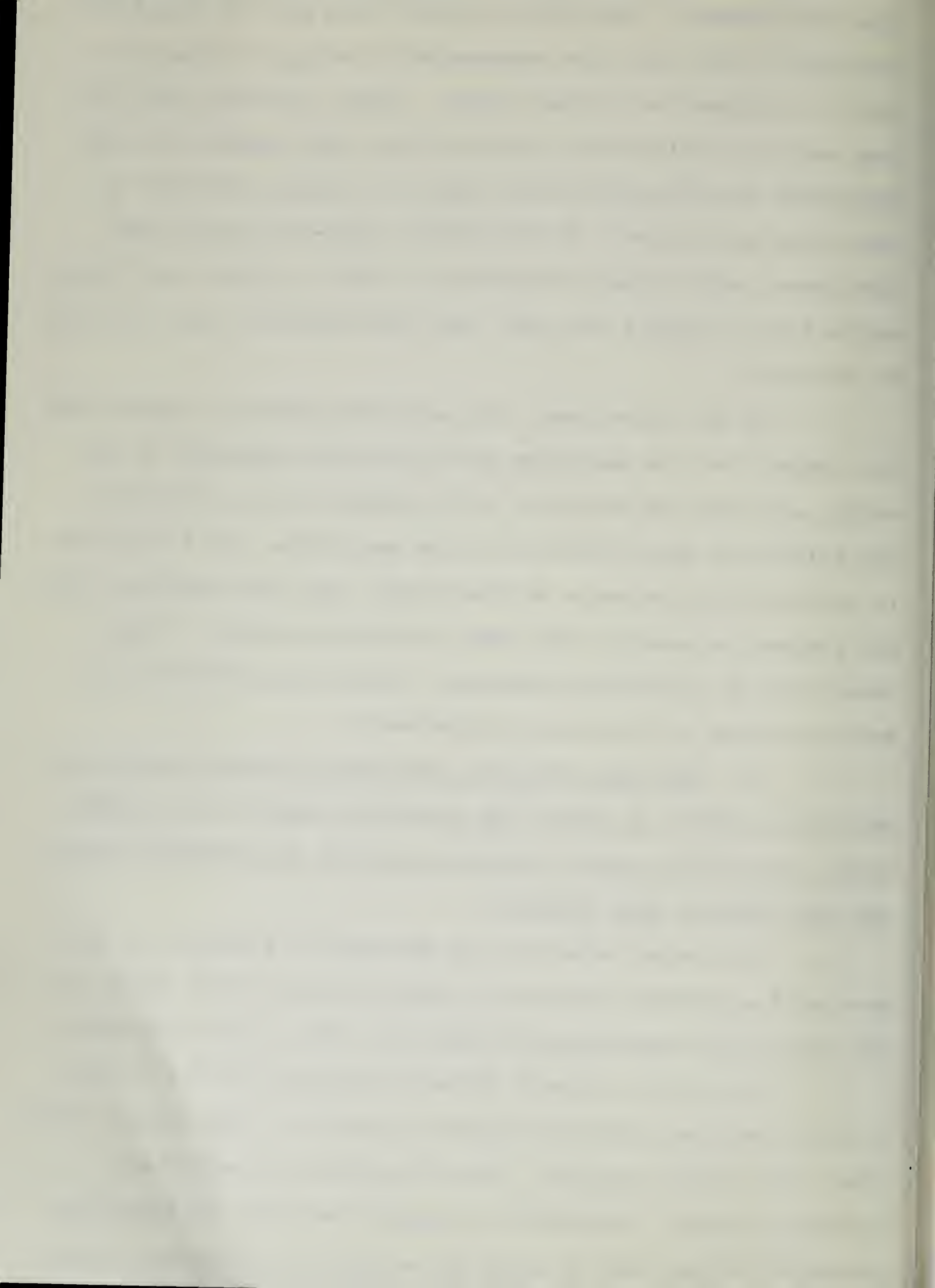
from the judgment. The motion appealed from was not appealable. According to the court the nonappealable rulings in themselves could be reviewed on a later appeal. Again, however, this is a long way from saying that a plaintiff may gain review of a non-appealable interlocutory order simply by defying the court in some other particular. If plaintiff's position were the law, then there could be many situations in which a trial court had no choice but to dismiss the case, and justifiably so, and yet might be reversed!

On the other hand, if plaintiff prevails on appeal with his claims that the sanctions were beyond the authority of the court; and that the dismissal of the failure to pay sanctions, for failure to obey orders as to the memorandum, and for failure to prosecute was an abuse of discretion; then the appellate court may proceed to consider the other collateral motions. They should not be considered otherwise, because plaintiff will not have prevailed on the issue of dismissal.

D. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTIONS TO AMEND, TO VACATE THE PROTECTIVE ORDER, AND TO RECONSIDER THE COURT'S RULING REGARDING EVIDENCE OF AGREEMENTS AFFECTING THE CONCRETE PIPE INDUSTRY.

A concise exposition of defendant's arguments in support of its position relating to these motions may be found in the text of its memorandum of March 29, 1967. [C.T. 3786-3811]

The court properly denied plaintiff's motion to file a second amended complaint stating a Section 2, Sherman Act violation, for several reasons. First the plaintiff waived any Section 2 claims. Plaintiff's original complaint alleged three causes of action, one of which was a Section 2 violation. After



a motion to dismiss had been granted, however, plaintiff filed an amended complaint stating only two causes of action. Omitted was the cause of action alleging the offenses of Section 2 of the Sherman Act. Much later as the trial date neared, plaintiffs had announced that they intended to amend to add § 2, but failed to do s within a reasonable period of time. Second, amendments close to trial should be denied when no new facts are shown. Plaintiff admits that no new facts were shown in this case. [C.T. 3723, lines 14-15] Third, a Section 2 amendment would have been inherently disruptive and would have required a reopening of discovery. In order to defend against a Section 2 charge, it would be necessary for defendants to gather the market data necessary in defending an "attempt" case. Section 2 introduces the issue of "dangerous probability" of actual monopolization, an issue which can be evaluated only against relevant geographical and product market data. Swift & Company v. United States, 196 U.S. 375 (1905); Walker Process Equipment Company v. Food Machinery Corp. 382 U.S. 172 (1965).

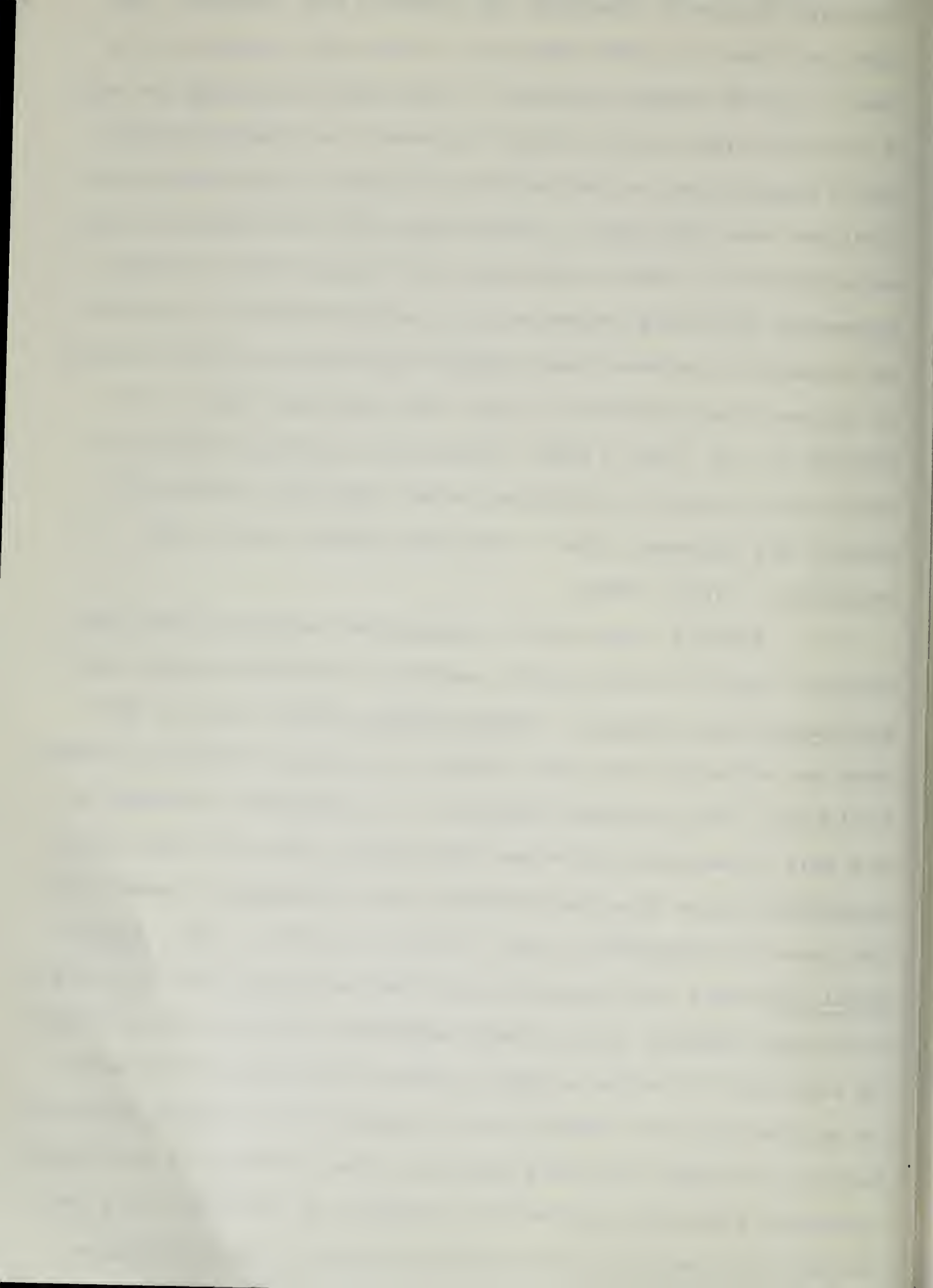
The court properly denied plaintiff's motion for an order vacating or modifying the protective order regarding defendants' documents. In relation to this motion the court had previously heard all of the arguments of the plaintiff, presented in a Memorandum of Points and Authorities dated October 23, 1966 and in the hearing of December 13, 1966. In any event, there was no showing by Perovich and Davin of any sufficient need for them personally to inspect defendants' competitively sensitive documents. In fact, plaintiff's attorney Les J. Weinstein, Esq. spent a total of only forty-five minutes in these files, before pronouncing them unintelligible.

[C.T. 3763] In addition, despite plaintiff's contentions, expert assistance is available and had been used in the related No-Joint cases. [R.T. 12/13/66, p. 39, line 3] Plaintiff's argument that Mr. Perovich is no longer in the pipe lining business and does not intend to pursue the same must be taken with some skepticism, considering that Mr. Perovich in 1967 was only thirty-eight [C.T. 3801] and considering Mr. Perovich's demonstrated lack of veracity, detailed in the statement of the case. The only plausible problem in reading the documents in the depository was the use of technical terms therein; Mr. Weinstein could have at any time asked Mr. Perovich or Mr. Davin to explain the terms. [Cf. the Protective Order, C.T. 3591-3594] In addition the defendants presented evidence that a former employee of one of the defendants (V.L. Greedy) who joined plaintiff Inplace had taken much of the defendant's valuable, secret and confidential information regarding inplace rehabilitation with him. That information, in turn, was disclosed by Mr. Davin to Mr. Perovich. [Affidavit of William McD. Miller, C.T. 2588-2591] Plaintiffs argue that the defendants did not seek a protective order barring each other from access to the document depository, but only counsel had such access.

Finally the trial court did not err in denying plaintiff's motion to reconsider the court's ruling precluding discovery relating to alleged agreements to allocate concrete pipe jobs among defendants. The Perovich plaintiffs are engaged in the business of inplace rehabilitation of steel and cast iron pipe, a service performed by contractors, which is not competitive with the manufacture and sale of concrete pipe. On October 3, 1966 the court denied plaintiffs the right to undertake

wholesale discovery regarding the concrete pipe industry, but permitted them to pursue discovery to show the existence of a link or tie-in between evidence of agreements affecting the sale of concrete pipe and the alleged agreement to eliminate plaintiff's competitors in the business of inplace rehabilitation of steel and cast iron pipe. Already plaintiffs had deposed numerous witnesses in depth concerning the alleged market sharing agreements affecting concrete pipe, and had failed to establish any connection between those alleged agreements and the business of inplace rehabilitation of cast iron and steel pipe. [R.T. 10/3/66, p. 55, lines 13-20] Plaintiff's attempted analogy to the No-Joint cases is fallacious since there the plaintiff's product was concrete pipe -- the same product sold by the defendants. [C.T. 3806]

Finally, appellant's unsupported conclusion that the district court's ruling would constitute reversible error under Continental Ore Company v. Union Carbide (1962) 370 U.S. 690 does not withstand analysis. There, the court reversed a verdict holding that excluded evidence of a conspiracy relating to the sale of vanadium oxide was admissible, since the jury could reasonably infer from that evidence that defendant's conduct was the cause of plaintiff's loss. 370 U.S. at 697. Thus, Continental Ore dealt with causation and does not stand for the proposition that evidence of an illegal agreement affecting one industry is sufficient to allow a jury to infer that plaintiff's losses in another distinct industry were caused by the illegal agreement. Nor does it stand for the proposition that evidence of an illegal agreement affecting one industry supports an inference of a conspiracy to eliminate a plaintiff in another separate industry.



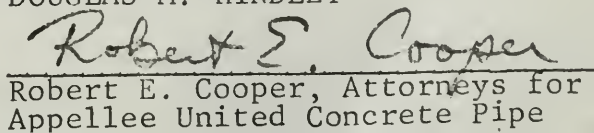
VI

CONCLUSION

Plaintiff seeks to give the impression that a tough and despotic trial court judge, setting unrealistic deadlines, unfairly prevented him from bringing his action to trial. Yet the record shows that Judge Pence granted five extensions of time for the plaintiffs to file their trial brief. He bent over backwards in allowing plaintiffs to present complex motions which he had resolved once before. The plaintiffs were simply unwilling to comply with the court's schedules and orders. Rather than comply with the order to prepare a brief by April 4, 1967, plaintiffs engaged in a futile effort to redo prior matters. Upon losing on those matters, plaintiffs elected -- and it is quite clear from the facts that it was not an election forced upon them by alleged poverty -- to defy the court's orders imposing sanctions and setting April 27 as the due date for the trial brief. Plaintiff made it quite clear at that time that he wanted to seek his remedy in the Court of Appeal. Judge Pence clearly had no choice but to dismiss the action for failure to prosecute and for failure to comply with his orders; anything less would have rewarded direct defiance of the solemn orders of a United States District Court. That being so, the Court of Appeals should have no hesitation in affirming the judgment.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
JOHN J. HANSON
ROBERT E. COOPER
DOUGLAS M. HINDLEY



Robert E. Cooper, Attorneys for Appellee United Concrete Pipe

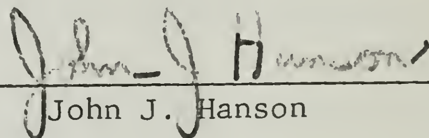
AFFIDAVIT OF JOHN J. HANSON

John J. Hanson, being first duly sworn, deposes and says:

1. I am an attorney and am a member of the Bar of the State of California, United States District Court for the Central District of California and the United States Court of Appeals, Ninth Circuit. I am a partner with the law firm of Gibson, Dunn & Crutcher and have been actively engaged in the practice of law with that firm since 1955.

2. I represented United Concrete Pipe Corporation, one of the defendants in B. W. Perovich v. Pipe Linings, Inc. et al., Superior Court of the State of California, County of Los Angeles, No. 775,274. In his complaint Mr. Perovich charged defendants with unfair trade practices and a conspiracy to restrain trade, and sought monetary damages.

3. On March 2, 1962, a settlement of Mr. Perovich's action was effected as to all parties. On that date, Mr. Perovich was paid the sum of $80,000, and he executed a release in favor of all defendants. Mr. Perovich's action was then dismissed with prejudice.

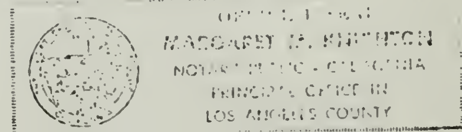


John J. Hanson

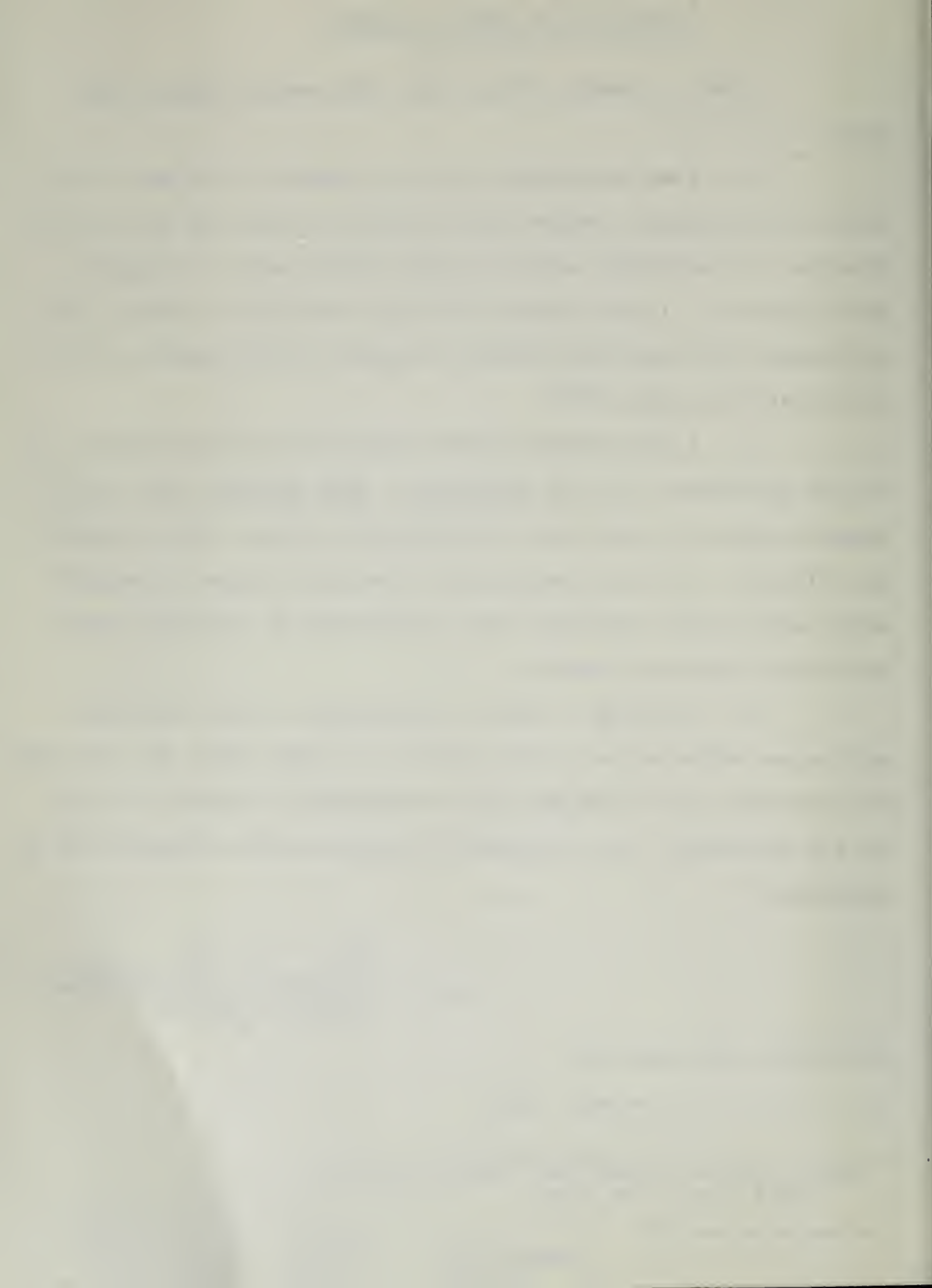
SUBSCRIBED AND SWORN TO
this 29th day of January, 1969

Notary Public in and for Margaret M. Knighton
Said County and State

My Commission Expires June 15, 1970



[EXHIBIT A]



DISTRICT OF HAWAII
HONOLULU 96813

September 21, 1966

[illegible] Joseph Ball, Esq.
[illegible] Federal Building
[illegible] South Spring Street
[illegible] Angeles, California 90012

Re: [illegible] Cases

Dear Mr. Ball:

[illegible] court is disturbed that you have not only taken so long but [illegible] actually waited until Mr. Cooper called the matter to your attention, before you responded relative to your position regarding pre-trial order No. 4. The problems actually raised, as well as [illegible] informed by you, [illegible] without a [illegible] -- [illegible] the very earliest date possible to this court and counsel. This court is still resolved that these cases shall be tried as now presently set, viz., February 13, 1967.

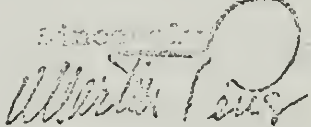
[illegible] page 2 of your letter you indicate that you have several motions that you want upon the agenda of any hearing. My records do not show that any such motions have been filed -- and no reason is set forth as to why they haven't been filed long heretofore.

[illegible] court will hold a pre-trial hearing in Los Angeles beginning [illegible] 10:00 A.M. on Monday, October 3, 1966, to consider your objections to proposed pre-trial order No. 4, as well as such motions [illegible] you shall file, with accompanying memoranda, not later than [illegible], September 26, 1966, at 12:00 Noon. Defendants will not [illegible] required to file answering memoranda but will be prepared to [illegible] oral argument regarding the same at time of hearing. [illegible]ntiff will also file by that date plaintiff's response to [defe]ndants' objections to plaintiff's [illegible] interrogatories.

[illegible] court calls your attention to the fact that it has not yet [illegible] plaintiff's answers to [illegible] interrogatories to [illegible] plaintiff" dated June 14, 1966 and "Defendants' special interrogatories to each plaintiff re plaintiff's damage claims", [illegible] August 5, 1966. Plaintiff's answers to these interrogatories [illegible] due on September 15, 1966.

[illegible] other relevant problems will also be considered at the hearing.

Sincerely,



[illegible]: [illegible], Mullin, Richter & Hampton
[illegible], [illegible] & [illegible]
Richards, Watson & [illegible]
Gibson, Dunn & Crutcher ✓

9-23-66

<u>PROOF OF SERVICE BY MAIL</u>

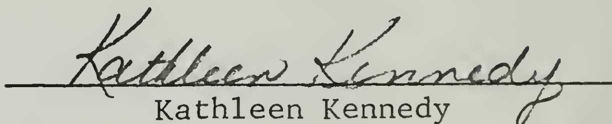
STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, KATHLEEN KENNEDY, being first duly sworn, depose and say:

I am a citizen of the United States of America, and a resident of the county aforesaid; I am over the age of eighteen years, and not a party to the within-entitled action; my business address is 634 South Spring Street, Los Angeles, California 90014.

On January 30, 1969, I served the within APPELLEE'S BRIEF on the Appellant herein by placing two true copies thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Les J. Weinstein, Esquire
McKenna & Fitting
427 West Fifth Street
Los Angeles, California 90013



Kathleen Kennedy

SUBSCRIBED AND SWORN to before me this 30th day of January, 1969.

Notary Public in and for Said County and State Margaret M. Knighton

My Commission Expires June 15, 1970